88-340

No. ——

Supreme Court, U.S.
FILED
AUG 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALEXANDER PERUMAL, *et al.*,
Petitioners

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

MICHAEL W. MCCONNELL
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-3306

MICHAEL J. WOODRUFF
Counsel of Record
KIMBERLEE W. COLBY
MICHAEL STOKES PAULSEN
Post Office Box 1492
Merrifield, Virginia 22116
(703) 642-1070

DAVID L. LLEWELLYN, JR.
2700 North Main, Suite 1100
Santa Anna, California 92701
(714) 667-7994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37

QUESTIONS PRESENTED

Whether the First Amendment free speech rights of public high school students extend to the nondisruptive distribution of nonschool sponsored leaflets, and the purchase of advertising space open to the public generally in a school yearbook, where their speech concerns the activities or purposes of nonschool sponsored groups.

Whether the establishment clause requires censorship of otherwise protected student expression and association on campus, because of the religious content of such expression.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, the parties include the following: Petitioner Frederick Russell Read, by Guardian ad Litem F. Znette Read, and Respondents Kristine Kister, Dore J. Gilbert, Raghu P. Mathur, Louise Adler, and R. Kent Hann, in their official capacities as members of the Board of Education of the Saddleback Valley Unified School District; Dr. Peter Hartman, in his capacity as Superintendent, Saddleback Valley Unified School District, Donald L. Walker, in his capacity as Principal, El Toro High School; and Robert Metz, in his capacity as Principal, Mission Viejo High School.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. THE SPEECH CLAUSE HOLDINGS BELOW CONFLICT SHARPLY WITH THE DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS CONCERNING THE SCOPE OF STUDENTS' RIGHTS TO FREEDOM OF EXPRESSION	10
A. The School District's Policy Prohibiting Student Expression Promoting Nonschool Sponsored Meetings or Activities Is Unconstitutional on its Face	11
B. The School District's Policy Forbidding "Off-Campus or Private Clubs" From "Advertising in Any Form" Is Unconstitutional As Applied to Prevent Students from Nondisruptive Distribution of Leaflets Promoting a Lawful Meeting, or to Censor a Student's Paid Advertisement in an Advertising Section of a School Yearbook Open to the General Public	14
C. The Decision Below Is Symptomatic of, and Exacerbates, Continued Conflict and Confusion Among Lower Courts Concerning the Scope of Public School Students' Rights to Freedom of Expression	17

TABLE OF CONTENTS—Continued

Page

1. *The decision below conflicts with numerous lower federal court decisions recognizing public high school students' First Amendment rights to distribute non-school sponsored literature on campus* 18

2. *The decision below creates a direct conflict among lower courts as to school officials' authority to censor the content of paid advertisements in a school publication* 19

3. *The decision below reflects growing confusion among lower courts as to the relationship of* Tinker *to public forum analysis* 20

II. THE LOWER COURT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE PRESENTS AN UNSETTLED ISSUE OF BROAD PUBLIC IMPORTANCE 23

A. The Decision Below Is Contrary to This Court's Establishment Clause Decisions and This Court's Decisions Upholding Individuals' Rights to Freedom of Speech on Religious Subjects in Public Places 24

B. Lower Federal and State Courts and School Administrators Are Divided and Confused on the Question of Whether the Establishment Clause Requires Public School Censorship of Nondisruptive Student Religious Speech 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases Page

Abington School District v. Schempp, 374 U.S. 203 (1963) 26
Amidei v. Spring Branch Independent School District, No. 14-84-7673 (unreported) (S.D. Tex. April 26, 1985) 28
Arkansas Writer's Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987) 25
Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973) 18
Bender v. Williamsport Area School District, 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd* 741 F.2d 538 (3d Cir. 1984), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986) ..... 3, *passim*
Board of Airport Commissioners v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987) 12-13, 25
Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) 21, 22, 23, 28
Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) 14
Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987) 19
Cantwell v. Connecticut, 310 U.S. 296 (1940) 25
Clark v. Dallas Independent School District, 671 F. Supp. 1119 (N.D. Tex. 1987) 22, 29
Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981) 26
Corporation of Presiding Bishop v. Amos, 107 S. Ct. 2862 (1987) 25
Country Hills Christian Church v. Unified School District No. 521, 560 F. Supp. 1207 (D. Kan. 1983) 29
Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971) 3, 18
Engel v. Vitale, 370 U.S. 421 (1962) 26
Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972) 3, 18
Garnett v. Renton School District No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987) 22, 28-29
Grayned v. City of Rockford, 408 U.S. 104 (1972) 13

TABLE OF AUTHORITIES—Continued

Page

Gregoire v. Centennial School District, 674 F. Supp. 172 (E.D. Pa. 1987), *aff'd mem.* No. 87-1661 (3d Cir. June 16, 1988) 29
Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988) ..... 6, *passim*
Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977) 19, 27
Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 13
Heffron v. ISKCON, 452 U.S. 640 (1980) 25
Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973), *vacated on jurisdictional grounds*, 420 U.S. 128 (1975) 18
Jamison v. Texas, 318 U.S. 413 (1943) 25, 26
Johnson v. Huntington Beach Union School District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied for want of jurisdiction*, 434 U.S. 887 (1977) 5, 29
Karp v. Becken, 477 F.2d 171 (9th Cir. 1973) 18
Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) 19
Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) 13
Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981) 28
Lemon v. Kurtzman, 403 U.S. 602 (1971) 25
Lovell v. Griffin, 303 U.S. 444 (1938) 25
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) 28
Martin v. Struthers, 319 U.S. 141 (1943) 25, 26
McCollum v. Board of Education, 333 U.S. 203 (1948) 26
Mergens v. Board of Education, slip op. CV 85-0-426 (D. Neb. Feb. 2, 1988) 22, 29
Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984) 28
New York v. Ferber, 458 U.S. 747 (1982) 12
Police Department v. Mosley, 408 U.S. 92 (1972) 17, 25
Riseman v. School Committee, 439 F.2d 148 (1st Cir. 1971) (*per curiam*) 18

TABLE OF AUTHORITIES—Continued

Page

San Diego Committee v. Governing Board, 790 F.2d 1471 (9th Cir. 1986) 19, 20
Scoville v. Board of Education, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970) 18-19
Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972) 18
Stanton v. Brunswick School District, 577 F. Supp. 1560 (D. Me. 1984) 20
Stone v. Graham, 449 U.S. 39 (1980) (*per curiam*) 26
Sullivan v. Houston Independent School District, 475 F.2d 1071 (5th Cir. 1973) 3
Thomas v. Board of Education, 607 F.2d 1043 (2d Cir. 1979) 19
Thompson v. Waynesboro Area School District, 673 F. Supp. 1379 (M.D. Pa. 1987) 19, 22, 27
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) ..... 6, *passim*
Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) 19
Wallace v. Jaffree, 472 U.S. 38 (1985) 26
Widmar v. Vincent, 454 U.S. 263 (1981) ..... 17, *passim*
Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980) 19

Constitutions and Statutes

U.S. Const. Amend. I ..... *passim*
28 U.S.C. § 1257(3) 1
California Constitution, Article I, §§ 4, 24 7
California Code of Civil Procedure §§ 1084-1095 6
California Education Code Section 48907 2
Saddleback Valley Unified School District Policy Nos. 5145.3 & 6144.1 ..... *passim*
Saddleback Valley Unified School District Policy No. 5133.1 ..... *passim*

Other Authorities

Witkin, 8 *California Procedure* (3d Ed. 1985) 6
Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L.Rev. 1, 11-2 (1986) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ——

ALEXANDER PERUMAL, *et al.*,
Petitioners

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioners Alexander Perumal and Frederick Russell Read respectfully petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Fourth District, Division 3.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A) is reported at 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988). The order of the California Supreme Court denying review (Pet. App. C) is not reported. The decision of the California Superior Court (Pet. App. D) is not reported.

JURISDICTION

The decision of the California Court of Appeal was entered on January 29, 1988. The California Supreme Court denied review on April 27, 1988 (Pet. App. C) and the judgment of the Court of Appeal therefore became final on May 18, 1988 (Pet. App. B). On July 21, 1988, the time for filing a petition for certiorari was extended to and including August 25, 1988 (Pet. App. E). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant portions of the State of California Education Code, § 48907, are set forth in Appendix F, at Pet. App. 51a.

Saddleback Valley Unified School District Board Policy Nos. 5145.3 & 6144.1, Board Policy 5133.1, and Administrative Regulation 5133.1, are set forth, in relevant part, in Appendix F, at Pet. App. 51a-53a.

STATEMENT OF THE CASE

1. Saddleback Valley Unified School District ("Saddleback" or "district") is a large public school district in Southern California, serving the cities of Mission Viejo, El Toro, and the smaller communities near these cities. The district operates five high schools, including one at Mission Viejo and one at El Toro.

This case arose out of separate requests by two students (one at each of these two high schools, petitioners Alex Perumal and Russ Read), during the 1984-85 academic year for permission to distribute flyers to other students during lunch hour, in a nondisruptive manner, and in accordance with the district's prescribed time, place and manner regulations. The flyers, or handbills, were entirely student-written and student-produced; they were not published under school authority or with use of school funds. The flyers contained a short religious message and a quotation from the Bible, and invited interested students to attend informal "New Life" Bible studies led by Alex Perumal and Russ Read at their respective campuses, which met once or twice weekly during

the students' lunch hour, on the school lawn or on the outside steps of a school building.[1] (Copies of the actual handbills in question are reproduced in the opinion below. Pet. App. 15a-16a.)

Perumal and Read sought permission to distribute the flyers pursuant to the school district's written policies concerning students' rights to freedom of speech on school grounds.[2] The district's Policy Nos. 5145.3 & 6144.1 recognize the constitutional rights of students "to distribute petitions, circulars, leaflets, newspapers and other

---

[1] The lawfulness of the meetings themselves is not at issue here. *Compare Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986). The school district and school officials concede the right of students to meet as they do, for voluntary, student-led Bible study and prayer on the lawn, during lunch. Superior Court File record (SCF) 328 (respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate); SCF 172 (declaration of Superintendent Hartman); SCF 164 (declaration of Asst. Superintendent Harrison); SCF 149 (declaration of Robert Metz, principal, Mission Viejo High School); SCF 143 (declaration of Donald Walker, principal, El Toro High School). Indeed, the district has recognized (as did the court below) that it is the students' constitutional right under the First Amendment to meet togeher and discuss whatever they like. Pet. App. 7a.

The students' meetings were entirely student-initiated and student-led, and were not sponsored by the school in any way. No school personnel attended or participated in the students' Bible studies and discussions. School officials were aware of these meetings, but did not object to them as contrary to school policy or disruptive of the school environment. Neither, however, did the district sponsor the meetings as official school clubs or activities. SCF 148-149. *See also* SCF 328, 172, 164, 143; Pet. App. at 2a-3a, 7a.

[2] The school board's policies require prior submission to the school principal, or his designee, of literature to be distributed on-campus. The principal is required to act on this request within 24 hours, applying the criteria stated in these policies. The system of prior review itself is not challenged here (*Compare Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir. 1972), *with Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971)), nor is it disputed that petitioners took all appropriate steps to comply with the board's prescribed procedures. *Compare Sullivan* v. *Houston Independent School District*, 475 F.2d 1071 (5th Cir. 1973).

printed matter [not published under school authority]," subject only to certain content-neutral time, place and manner regulations (not at issue here), and three specific content limitations—that the material not be legally obscene to minors; that it not be legally libelous; and that it not create "a clear and present danger of the imminent commission of unlawful acts on school premises or the violation of lawful school regulations or the substantial disruption of the orderly operation of the school." SCF 36.[3]

School officials at each school, acting on the basis of instructions by the school board and superintendent, refused permission for petitioners to pass out the flyers. There was no suggestion that the passing out of flyers would be disruptive of the school environment, interfere with the rights of other students, or violate any of the time, place, and manner regulations promulgated by the school to assure order and the protection of the rights of other students. Rather, Perumal and Read were told that, notwithstanding Policy Nos. 5145.3 & 6144.1, the content of their flyers was unacceptable because they constituted "advertisement" for off-campus or private student groups not "approved" by the school, and that this violated School Board Policy No. 5133.1 (SCF 19, 22, 149, 164).

Policy No. 5133.1 states, in pertinent part:

> No off-campus or private clubs are permitted to function in the School. They are also restricted from advertising in any form.
>
> The only clubs and organizations which may use school facilities during the school day are those which are school sponsored. The school day includes nonclassroom time.[4]

---

[3] The relevant portions of Policy Nos. 5145.3 & 6144.1 are set forth in Appendix F, Pet. App. 51a-53a.

[4] Administrative Regulation 5133.1, however, provides that Board Policy 5133.1 is to be interpreted in conformity with Policies 5145.3 & 6144.1. SCF 41. Pet. App. 53a.

Perumal and Read were told that, as school authorities interpreted these policies, they were permitted to meet for informal Bible studies and prayer on the school campus, during lunch hour, but prohibited from any form of "advertising" for such meetings, such as the flyers. SCF 143, 149, 172. School officials stated that such a restriction was necessary to comply with the Establishment Clause of the First Amendment (SCF 149), and cited the case of *Johnson v. Huntington Beach Union School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied for want of jurisdiction*, 434 U.S. 887 (1977), as the basis for their conclusion that Policy No. 5133.1 as applied was a "lawful school regulation" of the students' rights of free expression. SCF 19, 22.

Perumal and Read together submitted a written request to the school board and superintendent, asking that the district place on the agenda of the next board meeting the matter of the denial of the requests to pass out the religious handbills. SCF 20. Perumal and Read were informed by respondents that their requests were denied, and the issue was not placed on the school board agenda.

That same school year, petitioner Read submitted an advertisement for the personal advertisement section in the back of the Mission Viejo High School yearbook. The advertising section is open to anyone wishing to purchase space, and consists of paid advertisements by local businesses and personal messages paid for by parents or students. Pet. App. 7a-8a. *See* Pet. App. 39a (Crosby, J., dissenting) (giving examples). As Photo Editor of the yearbook, Read was entitled by staff policy to submit an advertisement without payment of the $50.00 fee for his one-quarter page advertisement, though he was prepared to pay the $50.00 fee if necessary. SCF 9-10. Read chose to use his advertising space for a photograph of members of the New Life Bible study at his school, with a message welcoming other students' participation, and a quotation from the Bible. School authorities censored the submitted ad, citing Policy 5133.1's prohibition on

advertising by off-campus or private clubs (SCF 31-33) and concerns that Read's ad would violate the establishment clause. SCF 173 (declaration of Superintendent Hartman) ("After reviewing the [yearbook] ad and based on advice from legal counsel, I determined that the ad was a violation of the District Policy and could be a violation of the First Amendment requirement previously discussed with Mr. Read.").

2. Thereafter, Perumal and Read commenced this action in California superior court [5] for a writ of mandate directing school officials to allow distribution of the flyers in accordance with the school's free speech policy, subject to the relevant time, place, and manner regulations, and to allow publication of Read's yearbook ad. The suit also requested damages relief.[6] The school district defended on two grounds: first, that Policy 5133.1, as interpreted to allow the students' lunch hour religious meetings but to forbid leafletting or the yearbook ad, was a permissible school board regulation violating no free speech right of petitioners; and second, that allowing the distribution of the flyers or publication of the yearbook ad would violate the establishment clause.

---

[5] The federal questions presented in this petition were raised at each stage of the state court proceedings, either by petitioners as an affirmative ground for relief, or defensively by respondents.

[6] Under California Procedure, a petition for a writ of mandate may include a prayer for damages relief. Code of Civil Procedure (CCP) § 1095; *see* Witkin, 8 *California Procedure* (3d Ed. 1985), § 203 at 831. The procedure is closely analogous to the federal court practice of including claims for both injunctive (equitable) and damages (legal) relief in a single complaint, with the technical difference that, under California Procedure, mandamus is a legal, not equitable remedy (though its function is virtually identical to a mandatory injunction). CCP §§ 1084-1095. Witkin, 8 *California Procedure* at 643-44, § 4, 656-57, § 19 (and sources cited).

While petitioners' personal claims for mandatory relief are moot, their claims for damages present a live controversy. *See, e.g., Hezelwood School District* v. *Kuhlmeier*, 108 S. Ct. 562, 566 (1988); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 504, 514 (1969).

The superior court denied petitioners all relief, without opinion. Its order stated simply: "Petition for Writ of Mandate, damages and attorney fees denied. Each party to bear their own costs." Pet. App. 49a.

The California Court of Appeal affirmed by divided vote, 2-1 (Appendix A Pet. App. 1a-46a), holding that the school district was not obliged to permit the students' literature distribution because the students' meetings were not sponsored by the school district and because the religious content of the students' flyers would violate the establishment clause of the First Amendment and Article I, §§ 4, 24 of the California Constitution.

The majority agreed with the school district that Perumal and Read represented their respective groups of students holding the lunch hour Bible studies, and that these "New Life" groups constituted off-campus or private clubs within the meaning of the school's regulations. Pet. App. 7a. The court concluded that "board policy 5133.[1] is a constitutionally permissible school board regulation" because it "allows only school sponsored activities on its campus." *Id.* at 13a. The court believed that "the fact the board has allowed the students to informally meet is of no moment," but also agreed that the school could not prohibit such "interpersonal communication or informal discussions between students." *Id.* at 7a.

The majority noted that Read's yearbook ad "presents a different issue" and found that "the school opened its advertising section to anyone who wished to purchase space." Pet. App. 7a-8a. However, the court concluded that the school district nonetheless "has chosen a closed forum and only school-sponsored clubs may function *or advertise*." Pet. App. 9a (emphasis in original).

The majority also held that the flyers and the yearbook ad could be prohibited because of the establishment clause and comparable state constitutional provisions. "So long as the district maintains a closed forum policy, it cannot constitutionally recognize New Life groups as school

sponsored clubs. The groups without such recognition may not hand out the flyers on campus nor may they advertise in the yearbook." *Id.* at 13a.

Justice Crosby filed a dissent. With respect to the flyers, Justice Crosby noted that "[s]tudents have a broad right to publish their own *privately* produced writings on campus" (Pet. App. at 24a (emphasis in original)) and that "[t]he district's argument to the contrary is a circular transformation of procedure into substance." Pet. App. 23a. Justice Crosby also dissented on the establishment clause issue, again emphasizing the distinction between student speech and government speech. "High school students cannot transgress the establishment clause; only governments can." Pet. App. 25a. This principle, in Justice Crosby's view, rendered the establishment clause argument an illegitimate basis for censorship of the students' flyers: "The majority's belief that government officials can prevent a student from handing a piece of paper to another student during a recess simply based on the allegedly religious nature of the words it contains is without precedent, principled logic, or any serious constitutional justification." *Id.* at 36a. As to the yearbook ad, Justice Crosby emphasized that the breadth of the open forum negated any impression of school endorsement:

> [The yearbook's] advertisement section contains messages from a major real estate developer, bicycle shop, attorney, hair salon, pet store, ice cream parlor, florist, chiropractor featuring accupressure, orthodontist, auto insurance company, and several student groups that look suspiciously like off-campus clubs, among a number of others. The school district obviously endorses none of these businesses or organizations merely because their messages appear in the book.

Pet. App. 39a (footnote omitted).

3. Petitioners sought discretionary review by the California Supreme Court, which denied review on April 27,

1988. Pet. App. 48a. On July 21, 1988, Justice O'Connor granted petitioners' application to extend the time in which to file a petition for certiorari in this Court to and including August 25, 1988. Pet. App. 50a.

REASONS FOR GRANTING THE WRIT

This case concerns censorship by government officials of student expression on campus, because of the subject of that expression: religion. Petitioners Alex Perumal and Russ Read sought to distribute to their public high school classmates, in a manner and at times and places in complete compliance with school district regulations, homemade flyers about informal student Bible studies meeting outside during lunch at their respective campuses. Russ Read also sought to use the personal advertising space he had earned by his work as Photography Editor of his school's yearbook to include a picture of his Bible study group and tell of its meetings and purposes. Officials of Saddleback Valley Unified School District, however, completely censored both the flyers and the yearbook ad, contending (1) that they may ban any and all student expression concerning the discussions, meetings, or activities of nonschool sponsored or nonapproved groups, pursuant to a district policy prohibiting "advertising" by off-campus or nonschool sponsored organizations; and (2) that the establishment clause of the First Amendment requires them to do so in the case of petitioners' flyers and yearbook ad.

This case thus presents important, recurring, and unresolved issues of First Amendment law concerning freedom of speech, religion, and public education: First, whether the First Amendment free speech rights of public high school students extend to the nondisruptive distribution of nonschool sponsored leaflets, and the purchase of advertising space open to the public generally in a school yearbook, where the subject matter of such speech concerns the activities or purposes of nonschool sponsored groups. Second, whether the establishment clause of the First Amendment requires that otherwise protected, law-

ful student expression be censored or excluded from public high school premises or publications because it is religious in content. These questions raise issues of enormous practical and constitutional significance, affecting the practices of literally every school district in the nation and involving the rights of public high school students in every one of these districts. The decision below, upholding censorship of both forms of student expression in this case, is contrary to this Court's cases and reflects growing confusion among lower courts as to the proper scope of students' rights to engage in nonschool sponsored expression, including religious expression and association.

I. THE SPEECH CLAUSE HOLDINGS BELOW CONFLICT SHARPLY WITH THE DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS CONCERNING THE SCOPE OF STUDENTS' RIGHTS TO FREEDOM OF EXPRESSION.

The first speech clause issue in this case is the one reserved by this Court last Term in *Hazelwood School District* v. *Kuhlmeier*, 108 S.Ct. 562 (1988): whether, or under what conditions and subject to what constitutional constraints, high school officials may impose content-based restrictions on newspapers, flyers, leaflets, or other "publications not sponsored by the school, that students seek to distribute on school grounds." *Id.* at 571, n.6. Specifically, the question is whether, as the court below held, school authorities may ban student literature not produced under school authority concerning nonschool sponsored meetings or groups, on the ground that the school has a "closed forum" policy. *See Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969). The second speech clause issue is also one left unresolved by *Hazelwood*: whether school officials' authority to restrict student expression occuring in school-sponsored publications, based on the content of such expression, extends to the paid advertising section in the back of a school yearbook, where the school has, as here,

"opened its advertising section to anyone who wished to purchase space." Pet. App. 7a-8a.

The court below, ignoring *Tinker* and *Hazelwood* entirely, reached a conclusion utterly irreconcilable with those controlling cases; namely, that school officials may ban student speech, protected under the clear terms of *Tinker* or occuring in a form open to the general public, simply because the speech concerns "nonschool sponsored" or "nonschool approved" groups. The decision below contradicts the fundamental and heretofore settled principle that public school students "may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. *See Hazelwood*, 108 S.Ct. at 567. The policy under which the Saddleback school district suppressed petitioners' speech is unconstitutional on its face, and as applied to both the flyers and the yearbook ad. The decision below seriously misapplies this Court's "public forum" doctrine to student speech clearly not sponsored or endorsed by the school: student distribution of literature falling within the scope of free speech rights recognized in *Tinker*; and student expression in the public advertising section of a school yearbook. Finally, the decision below is in direct conflict (on both questions) with holdings of federal appellate courts.

A. The School District's Policy Prohibiting Student Expression Promoting Nonschool Sponsored Meetings or Activities Is Unconstitutional on Its Face.

Petitioners' leaflets and yearbook ad were banned under the school district's Policy No. 5133.1, which states in relevant part: "No off-campus or private clubs are permitted to function in the School. They are also restricted from advertising in any form." This policy prohibits all "advertising in any form" by off-campus or private "clubs." The term "club" is expansively interpreted by respondents and the California courts to include any "identifiable" group, however informal, that promotes a "common purpose" and "solicits new members." Pet.

App. 6a. The term "off-campus or private" is also interpreted broadly, to include any group that is not "sponsored" by the school. SCF 143, 151. The policy thus restricts the rights of any nonschool sponsored group of students (or its members) to distribute written materials concerning the activities or purposes of their group.[7] This policy is unconstitutional on its face, even without regard to the particular facts of this case. See *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, 107 S.Ct. 2568 (1987).

As in *Jews for Jesus*, the school district's policy reaches virtually "the universe of expressive activity" by nonschool sponsored groups. 107 S.Ct. at 2572. The overbreadth of the policy is truly extraordinary. It would, for example, prohibit student members of Young Republicans (assuming it is a nonschool sponsored group) from distributing leaflets promoting an off-campus speech by their candidate, indeed from passing out position papers or campaign advertising of any sort. It would prohibit students from publicizing a community event, a civic meeting to discuss a public issue, or a political rally on a particular issue, such as nuclear weapons, apartheid, or aid to the homeless—all of which are nonschool sponsored, off-campus, or private events that involve groups of persons. Sierra Club student members could not publicize Earth Day gatherings, and PUSH student members could not inform fellow students about a boycott of racist

---

[7] The terms of Policy 5133.1 go considerably further, and appear to ban any "function[ing]" on-campus of such "off-campus" or "private" clubs. Curiously, however, the school district does not view the lunch hour meetings of the "New Life" Bible studies of which petitioners were members as violating this rule, but *does* view distribution of religious flyers informing other students of these meetings as improper "advertising" for such an off-campus or private club. While this may be a somewhat unusual construction of the language of the policy, the decision of the California Court of Appeal, upholding this reading, is an authoritative state court construction of a provision of state law, binding on federal courts. *New York* v. *Ferber*, 458 U.S. 747, 767 (1982).

businesses. The policy even bans the circulation of handbills urging students to meet together to *form* a new club, or handbills calling a meeting of students to discuss complaints they might have with school officials.

Since the policy bans all "advertising in any form" by informal groups not sponsored by the school administration, it would presumably ban the wearing of a black armband, as agreed on by a small group of individuals in an off-campus meeting to "publicize their objections to the hostilities in Vietnam"—the very mode of expression held protected in *Tinker*, 393 U.S. at 504. As in *Jews for Jesus*, it should be "obvious that such a ban cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition of speech." 107 S.Ct. at 2572.

Even were respondents to offer a "limiting construction" of the policy (*Jews for Jesus*, 107 S.Ct. at 2573) —that it applies only to "advertising" promoting *attendance* at a meeting of the "club"—this would be "of little assistance in substantially reducing the overbreadth of the resolution." *Id.* at 2573. There is no conceivable, constitutionally legitimate governmental justification for the district to prevent the distribution of information about, and invitations to, lawful off-campus and informal on-campus meetings.[8]

---

[8] Moreover, such attempts to avoid the plain overbreadth of Policy 5133.1 by a limiting construction (not adopted by the state courts) would create serious constitutional difficulties of vagueness. *Compare Jews for Jesus*, 107 S.Ct. at 2573. The policy itself contains no standards that would constrain administrative discretion in applying such a narrowing construction, but would essentially give school officials alone "the power to decide in the first instance whether a given activity" violates its policy (*ibid.*) and admit of "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria" to suppress protected expression. *Lakewood* v. *Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 2144 (1988). *See also Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972).

The only limitation on the policy's breadth is an illegitimate one: the policy is limited to groups that are not school-sponsored, and thereby limits speech (albeit imperfectly) to subjects and positions officially condoned by school authorities. This is the very evil that this Court repudiated in *Tinker*:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. . . . [S]chool officials cannot suppress "expressions of feelings with which they do not wish to contend."

393 U.S. at 511 (*quoting Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). Saddleback's policy is irreconcilable with this central principle of *Tinker*, and is unconstitutional on its face.

B. The School District's Policy Forbidding "Off-Campus or Private Clubs" From "Advertising in Any Form" Is Unconstitutional As Applied to Prevent Students from Nondisruptive Distribution of Leaflets Promoting a Lawful Meeting, or to Censor a Student's Paid Advertisement in an Advertising Section of a School Yearbook Open to the General Public.

Policy 5133.1 is also unconstitutional as applied in this case. Its prohibition against "advertising in any form" expressly applies to speech only by members of "off-campus or private clubs." By definition, the policy only applies to speech by members of *nonschool sponsored* groups. Accordingly, there can be no dispute that this case involves not the school's "authority over school-sponsored . . . expressive activities," but instead its "ability to silence a student's personal expression that happens to occur on the school premises" (*Hazelwood*, 108 S.Ct. at 569), and in a yearbook advertising forum opened "for indiscriminate use by the general public."

Id. at 568 (original quotation marks and citation omitted).[9]

1. Petitioners' proposed exercise of their free speech rights through leafletting falls squarely within the realm of "personal expression" protected by *Tinker* and reaffirmed in *Hazelwood*. In *Tinker*, this Court held that when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . , if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." 393 U.S. at 512-13 (brackets in original; citation omitted). We "do not confine the permissible exercise of First Amendment rights . . . to supervised and ordained discussion in a school classroom." *Id.* at 513. *See Hazelwood*, 108 S.Ct. at 567.

Accordingly, while there may be some constitutionally valid applications of Policy 5133.1, there is no imaginable constitutional justification for banning petitioners' leaflets under the circumstances of this case. There is no intimation in the record that the leaflets would be in any way (much less "materially and substantially") disruptive of the ordinary activity of the school.[10] Neither is there any suggestion that distribution of the leaflets would interfere with the rights of other students. Students not wishing to receive a leaflet may simply refuse it; students displeased by its message may throw it in

---

[9] The fact that the students in this case were part of a group does not detract from the constitutionally-protected status of their "personal expression." *Tinker*, too, involved students who belonged to an off-campus group. 393 U.S. at 504.

[10] We address *infra* the argument that the establishment clause requires censorship of student religious speech because of its content.

the trash can.[11] Petitioners agreed to comply with all the school district's prescribed time, place, and manner restrictions. The school district recognizes the right of individuals and school-sponsored groups to distribute such leaflets. The only basis for the schools' ban here is the contents of petitioners' message: that it promotes the activities or purposes of a nonschool sponsored club.

That the leaflets "advertise" informal, nonschool sponsored student meetings provides no justification for their suppression. The school district concedes that petitioners' lunchtime Bible studies are entirely lawful under the school's rules. Petitioners were "told they could meet informally by eating lunch together and could discuss whatever they wished." Pet. App. 2a, n.1. SCF 143, 149, 169, 172. Indeed, the court below noted that "interpersonal communication or informal discussions between students during the school day *cannot* be prohibited." *Id.* at 7a (emphasis added). Since the meetings themselves are lawful, advertising or publicizing them cannot be unlawful.

2. Application of Policy 5133.1 to ban petitioner Read's proposed yearbook ad presents a different legal issue, but is equally unconstitutional. Ironically, the district interprets its ban on "advertising" by non-sponsored groups to extend to a section of the yearbook *devoted to advertising* and broadly open to the *general public*, including a wide variety of "non-sponsored" groups and local businesses. The court below found that "the school opened its advertising section to anyone who wished to purchase space." Pet. App. 7a-8a. *See also* Pet. App. 39a (Crosby, J., dissenting) (giving examples).

---

[11] Petitioners' proposed distribution of leaflets was to have taken place in accordance with the school's prescribed condition that "[c]oercion is not used to induce students to accept the printed matter . . ." (Policy 5145.3). SCF 17.

A clearer example of a state-created public forum, or "forum-by-designation," is difficult to imagine. The advertising section of the yearbook is open not only for student organizations but, upon payment of the standard fee, "for indiscriminate use by the general public." *Hazelwood*, 108 S.Ct. at 568 (original quotation marks and citation omitted). As applied in this context, to Russ Read's personal ad, Policy 5133.1 amounts to nothing more than a selectively-enforced, content-based exclusion from a limited public forum for nonschool sponsored expression by nonschool sponsored speakers. Such an application—upheld by the court below—is plainly contrary to this Court's holding in *Widmar* v. *Vincent*, 454 U.S. 263, 267-68 (1981): "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *See also Police Department* v. *Mosley*, 408 U.S. 92 (1972).[12]

The decision below, upholding application of Policy 5133.1 to ban petitioners' flyers and yearbook ad misapplies this Court's public forum doctrine in both contexts, and cannot be reconciled with this Court's decisions in *Tinker*, *Hazelwood*, and *Widmar*.

C. The Decision Below Is Symptomatic of, and Exacerbates, Continued Conflict and Confusion Among Lower Courts Concerning the Scope of Public School Students' Rights to Freedom of Expression.

The decision below either creates or contributes to at least *two* sets of conflicts among lower courts as to the proper scope of students' speech rights. The decision below conflicts with those federal decisions that have applied *Tinker* to student publication and distribution of materials concerning or promoting nonapproved topics or

---

[12] As with the distribution of flyers, there is no basis for censoring Read's yearbook ads on grounds of disruption or violation of rights of others; and the meetings it "advertises" (or, more accurately, commemorates) are entirely lawful.

viewpoints. The decision below also conflicts with federal decisions applying public forum doctrine to prohibit school censorship of paid advertisements in school sponsored publications. Moreover, the faulty analysis of the California court below, in failing to distinguish between these two different types of situations, adds to the growing confusion among lower courts over the relationship of *Tinker* to public forum analysis, a question not resolved in *Hazelwood*. This Court's review is needed to reconcile these conflicts, and remedy the confusion in lower courts on these issues.

1. ***The decision below conflicts with numerous lower federal court decisions recognizing public high school students' First Amendment rights to distribute nonschool sponsored literature on campus.***

The decision below (that of a state court of last resort, under California practice), upholding a policy banning student literature promoting nonschool approved meetings or activities, conflicts with decisions of numerous federal courts applying the rule of *Tinker* to the issue of on-campus distribution by students of various forms of written literature (newspapers, flyers, circulars, signs) not produced under school authority. A majority of the lower federal courts have held that, aside from a very few limited categories of speech (not implicated here), specified under clear and precise criteria, school officials may not enforce content-based bans on the nondisruptive on-campus distribution by students of literature not produced under school authority.[13] The decision below, along

---

[13] *Jacobs* v. *Board of School Commissioners*, 490 F.2d 601 (7th Cir. 1973), *vacated on jurisdictional grounds*, 420 U.S. 128 (1975); *Baughman* v. *Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Karp* v. *Becken*, 477 F.2d 171, 176 (9th Cir. 1973); *Fujishima* v. *Board of Education*, 460 F.2d 1355 (7th Cir. 1972); *Shanley* v. *Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972); *Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971); *Riseman* v. *School Committee*, 439 F.2d 148 (1st Cir. 1971) (*per curiam*); *Scoville* v. *Board of Education*, 425 F.2d 10 (7th Cir.),

with *Hernandez* v. *Hanson*, 430 F. Supp. 1154 (D. Neb. 1977),[14] is in direct conflict with these decisions.

2. *The decision below creates a direct conflict among lower courts as to school officials' authority to censor the content of paid advertisements in a school publication.*

The lower court's holding with respect to petitioner Read's yearbook ad is in direct conflict with the decision of the U.S. Court of Appeals for the Ninth Circuit in *San Diego Committee* v. *Governing Board*, 790 F.2d 1471 (9th Cir. 1986). In *San Diego Committee*, the court held that a school newspaper that allowed advertising by members of the general public, including commercial speech and arguably political speech, had created a limited public forum for expressive activity (at least with respect to the advertising portion of the newspaper). 790 F.2d at

---

cert. denied, 400 U.S. 826 (1970); *Thompson* v. *Waynesboro Area School District*, 673 F.Supp. 1379 (M.D. Pa. 1987); *see Thomas* v. *Board of Education*, 607 F.2d 1043 (2d Cir. 1979); *cf. Bystrom* v. *Fridley High School*, 822 F.2d 747 (8th Cir. 1987).

A minority of decisions have upheld certain types of content-based restrictions on student literature other than obscene or indecent, libelous, or disruptive speech. But even those cases involve narrow categories of school-prohibited expression, such as commercial speech promoting the use of illegal drugs (*Williams* v. *Spencer*, 622 F.2d 1200 (4th Cir. 1980)), solicitation of funds from other students (*Katz* v. *McAulay*, 438 F.2d 1058 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972)), and solicitation of information about students' sexual conduct and attitudes for purposes of publishing survey results in the school-sponsored campus newspaper (*Trachtman* v. *Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978)). (The Second Circuit's decision in *Trachtman* may be correct on independent, alternative grounds under *Hazelwood*, since it involved student expression conducted in the context of a school-sponsored activity.)

[14] Even *Hernandez* limited its holding to "sectarian" expression, striking down the broader school policy, similar to Policy 5133.1, restricting literature distribution by, or on behalf of, all non-school sponsored groups. 430 F. Supp. at 1158, 1160.

1476-1478.[15] Accordingly, the court held that school authorities could not ban a political advertisement by a nonschool sponsored group opposing registration for the draft on the basis of either its subject matter or its viewpoint.

The decision below is inconsistent with *San Diego Committee* on the "public forum" issue, and in its result. The facts of the cases differ only in that the instant case involves advertising in a yearbook, and *San Diego Committee* involved advertising in a school newspaper. In each case, the school permitted advertising by the general public, and attempted to enforce a content-based exclusion against certain would-be advertisers. The court below, however, upheld the exclusion, while the Ninth Circuit rejected it in *San Diego Committee*. This Court should grant review on this issue of federal law, on which the Ninth Circuit has reached a result in conflict with that of a highest state court within that same circuit.[16]

3. *The decision below reflects growing confusion among lower courts as to the relationship of* Tinker *to public forum analysis.*

As noted above, petitioners' rights to free expression with respect to distribution of the flyers rest on a some-

---

[15] *San Diego Committee* predated this Court's decision in *Hazelwood*. To the extent language in the Ninth Circuit's opinion speaks generally of school-sponsored newspapers as public fora, that overbroad dictum remains valid only as a matter of state (California), not federal, law. The Ninth Circuit's holding with respect to advertising sections of the newspaper, however, does not appear to be controlled by *Hazelwood*, and thus remains the law in the Ninth Circuit.

[16] Moreover, the decision below conflicts with at least one other federal court decision finding that school authorities may not forbid purely student expression that occurs within a school yearbook, even outside the advertising pages. *See Stanton* v. *Brunswick School District*, 577 F. Supp. 1560, 1570-71 (D. Me. 1984) (student's choice of graphic description of person being executed as caption for her yearbook picture held protected expression within *"de facto"* public forum).

what different ground than petitioner Read's right to expression through his personal ad in the yearbook. The court below erred on both issues, but equally as disturbing is the difficulty the lower court had in identifying the different analysis applicable in each case. The opinion below is symptomatic of the confusion in the state and lower federal courts over the relationship of *Tinker* to this Court's public forum doctrine for analyzing certain First Amendment claims. The court below confused the question of students' *inherent* free speech rights under *Tinker* (rights, in this Court's famous words, that students "do not 'shed . . . at the schoolhouse gate,' " *Hazelwood*, 108 S.Ct. at 567, *quoting Tinker*, 393 U.S. at 506), with *additional* rights that might arise by virtue of school creation or designation of a special "forum" for student expressive activities, in time periods, locations, or media in which students' rights to speech and association are not already covered by the rule of *Tinker*. *See, e.g., Bender*, 475 U.S. 534 (1986) (school-created forum during first period of the school day, twice weekly).

Here, for example, the court below thought to justify censorship of petitioners' *flyers*, as well as the yearbook ad, on the ground that the school district "in enacting board policy 5133.1 changed from a limited open forum to a closed forum." Pet. App. 7a. Yet, as discussed above, the distribution of petitioners' flyers falls squarely within students' rights under *Tinker*. The censorship of the flyers is thus predicated solely on the school district's decision to "close" channels of expression that *Tinker* says are constitutionally required to remain open to students.

This confusion has afflicted other courts as well, including several federal district courts and at least one circuit of the U.S. Court of Appeals. The decisions frequently fail to distinguish between students' rights to freedom of expression under *Tinker* and students' rights of "equal access" to a forum for expression created at the discretion of school authorities. *See, e.g., Brandon* v.

Board of Education, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (addressing issue of whether high school itself is public forum, rather than whether students have group free speech rights on campus during noninstructional time); *Garnett* v. *Renton School District No. 403*, 675 F. Supp. 1268, 1277 (W.D. Wash. 1987), *appeal filed*, No. 88-3552 (9th Cir. 1988) (same); *Clark* v. *Dallas Independent School District*, 671 F. Supp. 1119, 1122 (N.D. Tex. 1987) (motion to alter or amend judgment pending) (same). Other decisions note, and rely on, the distinction. *See, e.g., Mergens* v. *Board of Education*, Slip op. CV 85-0-426 (D. Neb. Feb. 2, 1988) at 15 *appeal filed*, No. 88-1227NE (8th Cir. 1988); *Thompson* v. *Waynesboro Area School District*, 673 F. Supp. 1379, 1387 (M.D. Pa. 1987).

While *Tinker* antedated this Court's cases explicitly applying public forum analysis to questions of student free speech rights, *Tinker* is fully consistent with those decisions, and has been reaffirmed repeatedly by them. *See, e.g., Hazelwood*, 108 S.Ct. at 567, 569. The relationship of *Tinker* to this Court's "public forum" doctrine can be understood in either of two ways. *Tinker* either (i) denotes a broad category of circumstances in which the designation of a "limited public forum" is not a prerequisite for students' free speech rights on school grounds (i.e., students possess inherent First Amendment freedoms which they "do not shed" in the school context, and which are not dependent on school authorities' decision to create a limited public forum); or (ii) establishes, on a categorical basis, that public secondary schools necessarily are limited public fora for a category of speakers (students) and their speech that does not cause "material and substantial interference with schoolwork or discipline" (393 U.S. at 511), subject only to reasonable, content-neutral time, place, and manner regulations.[17]

---

[17] As this Court held in *Tinker*: "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those

Regardless of how the doctrine is articulated, it is clear that petitioners' distribution of flyers is constitutionally protected. Free speech does not lose its protection under *Tinker* merely because the school has announced a "closed forum." Left unreviewed, the decision below threatens to exacerbate confusion among lower courts on this point. It is important for this Court to correct this error, and to give the lower courts guidance concerning the relationship of *Tinker* to the public forum doctrine.

II. THE LOWER COURT'S INTERPRETATION OF THE ESTABLISHMENT CLAUSE PRESENTS AN UNSETTLED ISSUE OF BROAD PUBLIC IMPORTANCE

The court below held that the establishment clause of the First Amendment overrides any free speech rights petitioners might have:

> "While students have First Amendment rights to political speech in public schools, . . . sensitive Establishment Clause considerations *limit their right to air religious doctrines*. . . . [S]tudents' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting."

Pet. App. 13a, quoting *Brandon* v. *Board of Education*, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) (emphasis, ellipses, and omission of internal citations in original). On this ground, the court held that "board policy 5133.1 is a constitutionally permissible school board regulation," and that the school district is

---

activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process." 393 U.S. at 512. In the accompanying footnote, the Court approved the observation that a public school "is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property." *Ibid.*, n.6.

constitutionally *prohibited* from allowing petitioners to distribute leaflets on campus or publish the yearbook ad. Pet. App. 13a.

The decision below thus presents one of the most hotly disputed questions of constitutional law in the area of free speech and religion: whether the establishment clause authorizes or requires the government to censor otherwise protected expression and association by private persons, not sponsored or encouraged by the government, where the speech is religious in nature, the speakers are high school students, and their speech occurs on school grounds or in a school forum.

This was essentially the question on which this Court granted the writ of certiorari in *Bender*—stripped of some of its potentially complicating features.[18] The Court was unable to reach the merits in *Bender* because the court of appeals had lacked jurisdiction. But the question is no less important now than it was then. It remains unresolved, continuing to trouble school boards and school administrators and to divide lower courts.

A. The Decision Below Is Contrary to This Court's Establishment Clause Decisions and This Court's Decisions Upholding Individuals' Rights to Freedom of Speech on Religious Subjects in Public Places.

The free speech clause has consistently been held by this Court to protect religious expression by private individuals and groups—group meetings, leafletting (in-

---

[18] The instant case involves the pure question whether speech on public school premises must be censored solely because it is religious. While that was the core issue in *Bender*, it was clouded by such factors as: (1) the role of teachers in monitoring student religious groups; (2) whether the time spent in religious group meetings counted toward school attendance time required for graduation; and (3) whether formal school sponsorship would create an appearance of endorsement. The instant case has no such complications. Monitors are not involved; there is no question of credit; and the religious discussion groups are purely informal and not school sponsored.

cluding promotion of religious meetings or events), proselytizing—on the same terms as it protects speech on any other subject. *E.g., Jews for Jesus*, 107 S.Ct. 2568 (distribution of religious literature in public airport terminal); *Widmar* v. *Vincent*, 454 U.S. 263 (1981) (private religious group meetings and worship in state university facilities); *Heffron* v. *ISKCON*, 452 U.S. 640 (1981) (religious solictation at state fair); *Martin* v. *Struthers*, 319 U.S. 141 (1943) (door-to-door distribution of handbills advertising religious meeting); *Jamison* v. *Texas*, 318 U.S. 413 (1943) (distribution of religious handbill advancing religious message and promoting upcoming religious gathering in city park); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (playing of religious recording in sidewalk encounters); *Lovell* v. *Griffin*, 303 U.S. 444 (1938) (distribution of religious literature).[19] Similarly, it is firmly established that the establishment clause limits affirmative government promotion of religion, not private religious expression that merely happens to occur on state property. *E.g., Widmar*, 454 U.S. 263; *see Corporation of Presiding Bishop* v. *Amos*, 107 S.Ct. 2862, 2868-69 (1987) ("A law is not unconstitutional simply because it *allows* churches to advocate religion, which is their very purpose. For a law to have forbidden "effects" under *Lemon* [v. *Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activity and influence.") (emphasis in original). *See generally* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 9-14 (1986) (collecting and discussing authorities).

---

[19] This is merely a particular application of the well-settled principle articulated for the Court by Justice Marshall in *Police Department* v. *Mosley*, 408 U.S. 92, 95-96 (1972): "[A]bove all else, the First Amendment means that government has no power to restrict speech because of its message, its ideas, its subject matter, or its content." *Accord Arkansas Writer's Project, Inc.* v. *Ragland*, 107 S.Ct. 1722, 1728 (1987) (collecting cases).

With respect to petitioners' distribution of religious flyers, this case stands squarely at the intersection of *Tinker* and this Court's establishment clause cases. *Tinker* recognizes students' rights to *personal* expression on school grounds, where it is not sponsored by the school. And *Widmar*, *Martin*, *Jamison* and other cases recognize that personal *religious* expression on public property does not violate the establishment clause. Accordingly, if petitioners' rights to distribute flyers on campus are otherwise protected under *Tinker*, there is no principled basis for distinguishing this Court's establishment clause cases on the ground that the speech at issue here is that of high school students and takes place on school property.

Similarly, if petitioner Read's yearbook ad is protected as expression in a government-created forum open to a broad class of speakers, there is no principled basis for distinguishing *Widmar*'s holding that the establishment clause is not violated by private religious expression the government must tolerate under the free speech clause. Here again, the case stands at the intersection of *Tinker* and *Widmar*. Only *state*-sponsored, *state*-led or *state*-promoted religious activity can violate the establishment clause.[20] And the notion that the younger age, and consequent supposed greater "impressionability," of high school students provides justification for censoring their speech that is not disruptive of the school environment is totally inconsistent with *Tinker*. As Justice Crosby aptly noted in his dissent below, "[h]igh school students cannot transgress the establishment clause; only governments can." Pet. App. 25a.

---

[20] *See Wallace* v. *Jaffree*, 472 U.S. 38 (1985), *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). *See also Collins* v. *Chandler Unified School District*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981) (prayer at school assembly).

B. Lower Federal and State Courts and School Administrators Are Divided and Confused on the Question of Whether the Establishment Clause Requires Public School Censorship of Nondisruptive Student Religious Speech.

Despite its seeming simplicity, the issue of whether the establishment clause requires suppression of otherwise protected student expression because of its religious content is one that has caused great confusion and division in the lower courts and, consequently, among school administrators.[21] There is a clear, direct conflict among lower courts on the precise question presented here—on-campus distribution by students of nonschool sponsored religious literature. One older federal district court decision has taken the position of the court below, censoring student literature because of its religious content, while another, more recent, federal district court decision has reached the opposite conclusion, refusing to uphold censorship of student religious speech. *Compare Hernandez* v. *Hanson*, 430 F. Supp. 1154, 1161-62 (D. Neb. 1977) (holding First Amendment requires censorship of student distribution of religious literature, based on content) *with Thompson* v. *Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Pa. 1987) (holding First Amendment forbids censorship of student distribution of religious literature, based on content).

---

[21] The instant case is a prime example of this confusion. The Saddleback school district takes the position that the establishment clause forbids student religious expression on school grounds, but applies this principle only to handbills advertising meetings, not to the meetings themselves. The rationale for this is wholly unclear.

Respondents' confusion presents the problem in perfect microcosm: how to reconcile recognition of students' rights to free speech, without content-based censorship, with the (mis)perception that the establishment clause requires content-based censorship where the speech is religious or concerns religion. As this case illustrates, not only have different school districts (and courts) reached differing conclusions, but the approach even of a single school district can be internally inconsistent on the principle in question.

Moreover, there is a deep and extensive conflict of authorities over the broader issue of which the instant case is one example—whether (or under what circumstances) the establishment clause mandates the suppression of otherwise protected student expression on school grounds, because of its religious content. The issue is one that has arisen frequently in lower courts, with no hint of a definitive resolution or a diminution in litigation over the issue.[22]

This Court should grant review to decide this important question of law. The establishment clause issue in this case is one of broad and continuing public significance arising in a variety of contexts extending beyond the facts of this case. The issue is one that affects the policies and practices of literally every school district in every community in the nation, and the rights of students at those schools to engage in speech on religious subjects. This Court's review is essential to resolve this issue of fundamental rights which has continued to divide and confuse the lower federal and state courts (and local school districts), and to correct the erroneous judgment of the court below.

---

[22] *Compare Bender* v. *Williamsport*, 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd* 741 F.2d 538 (3d Cir. 1984), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986) (reinstating district court order allowing equal access to high school religious club meeting during activity period of school day); *Amidei* v. *Spring Branch Independent School District*, No. 14-84-7673 (unreported) (S.D. Tex. April 26, 1985) (upholding student religious meetings under Equal Access Act, 20 U.S.C. §§ 4071-4074); *Lanner* v. *Wimmer*, 662 F.2d 1349, 1356 (10th Cir. 1981) (allowing students to list their participation in off-campus released time program in yearbook), *with Nartowicz* v. *Clayton County School District*, 736 F.2d 646 (11th Cir. 1984) (establishment clause prohibits voluntary student religious meetings); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (same); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) (same); *Garnett* v.

CONCLUSION

Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-3306

MICHAEL J. WOODRUFF
Counsel of Record
KIMBERLEE W. COLBY
MICHAEL STOKES PAULSEN
Post Office Box 1492
Merrifield, Virginia 22116
(703) 642-1070

DAVID L. LLEWELLYN, JR.
2700 North Main, Suite 1100
Santa Anna, California 92701
(714) 667-7994

Renton School District No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987) (same); *Clark* v. *Dallas Independent School District*, 671 F. Supp. 1119 (N.D. Tex. 1987) (motion to alter or amend judgment pending) (same); *Johnson* v. *Huntington Beach Union School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied for want of jurisdiction*, 434 U.S. 887 (1977) (same). *See Mergens* v. *Westside Community Schools*, No. CV 85-0-426 (D. Neb. Feb. 2, 1988) (Equal Access Act construed not to require school to permit student religious meetings as part of club program; dictum that *Tinker* requires school to allow nonschool sponsored student religious meetings on campus). *See also Gregoire* v. *Centennial School District*, 674 F. Supp. 172 (E.D. Pa. 1987), *aff'd mem.* No. 87-1661 (3d Cir. June 16, 1988) (school district's refusal to rent facilities to religious organizations on equal basis with other organizations violates First Amendment); *Country Hills Christian Church* v. *Unified School District No. 521*, 560 F. Supp. 1207 (D. Kan. 1983) (same).

(2)

88-340

No. —

Supreme Court, U.S.
FILED
AUG 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALEXANDER PERUMAL, *et al.*,
Petitioners

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

MICHAEL W. MCCONNELL
1111 East 60th Street
Chicago, Illinois 60637
(312) 702-3306

MICHAEL J. WOODRUFF
Counsel of Record
KIMBERLEE W. COLBY
MICHAEL STOKES PAULSEN
Post Office Box 1492
Merrifield, Virginia 22116
(703) 642-1070

DAVID L. LLEWELLYN, JR.
2700 North Main, Suite 1100
Santa Anna, California 92701
(714) 667-7994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

55

TABLE OF CONTENTS

	Page
Appendix A —Opinion of the California Court of Appeal, Fourth Appellate District, Division Three	1a
Appendix B —Remittitur in California Court of Appeal	47a
Appendix C —Order Denying Review by the California Supreme Court	48a
Appendix D —Order of California Superior Court denying relief	49a
Appendix E —Order of Justice O'Connor granting extension of time	50a
Appendix F —Relevant Statutory Provisions and School Board Policies	51a

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

No. G003181

(Super. Ct. No. 45-78-95)

ALEXANDER PERUMAL and FREDERICK RUSSELL READ,
by Guardian ad Litem, F. ZNETTE READ,
Petitioners and Appellants,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

OPINION

[Filed Jan. 29, 1988]

APPEAL from a judgment of the Superior Court of Orange County, Philip E. Schwab, Judge. Affirmed.

David L. Llewellyn, Jr. for Appellants.

Rutan & Tucker, David C. Larsen and Leonard P. Sawyer for Respondents.

Alexander Perumal and Frederick Read appeal from a judgment denying a petition for writ of mandate seeking an order of the court directing Saddleback Valley Unified School District to allow distribution of a religious club's flyers on the district's high school campuses and to compel publication of the club's advertisement in a high school yearbook.

I

During the 1984-1985 school year, Alexander Perumal, a student at El Toro High School, and Frederick Read, a student at Mission Viejo High School, were members of student groups known as "New Life." The groups were organized to provide a forum for students to engage in Bible study and prayer during school. The students talked informally outside in groups of five to twenty-five during the lunch hour. The school's principals and the school district were aware of the meetings, but did not object.[1]

---

[1] Saddleback Valley Unified School District had previously allowed its high schools to sponsor religious student clubs such as New Life. But, as a result of parental complaints and county counsel opinions, the district, in March 1981, withdrew its official recognition. The students were permitted to continue meeting during the school day in classrooms and to advertise their meetings as unofficial organizations. In April 1981, a lawsuit was filed against the district seeking to prevent the groups from operating at the schools.

The members of the New Life club were informed they could no longer formally meet; only school sponsored clubs were permitted to do so. They were told they could meet informally by eating lunch together and could discuss whatever they wished. Small groups of students at El Toro and Mission Viejo High Schools immediately began to conduct informal Bible studies during their lunch period.

In 1984, Perumal and Read attempted to reestablish formal New Life clubs at their respective schools pursuant to the Federal Equal Access Act of 1984. (20 U.S.C. § 4071 *et seq.*) Perumal and Read, presenting themselves as presidents of the New Life clubs at their respective high schools, appeared before school board meetings. With the support of a citizens' Christian Evangelical group, Perumal and Read contended the district permitted other noncurriculum related clubs to meet and the district could not prevent them from doing the same. The district denied the requests.

Perumal and Read then requested the district to consider modifying the existing policy by creating a limited open forum so the New Life clubs could formally operate. After hearing extensive

In February 1985, in a written request to El Toro's principal, Perumal sought approval to distribute a flyer announcing the meetings. His request was denied. Read made a similar request to his principal and received the same response. Read also submitted an advertisement for the meetings which he asked be placed in the Mission Viejo High School yearbook. It was also rejected.[2]

Perumal and Read filed a petition for writ of mandate in superior court. They sought an order directing Saddleback Valley Unified School District to permit distribution of the New Life flyers at their high schools and to compel the publication of Read's New Life yearbook advertisement. Their petition was denied without comment.

II

Must a tax supported high school district board, which has adopted a closed forum policy, allow a student club to distribute religious flyers on the school campus during school hours or to place religious advertisements in a high school yearbook? In answering these questions, we look to the state and federal constitutions and relevant statutory and case authority.

"The First Amendment of the United States Constitution decrees, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .' [¶] The Amendment is made applicable to the states through the Fourteenth Amendment (*Abington School Dist.* v. *Schempp* (1963) 374 U.S. 203, 215 [10 L.Ed.2d 844, 854, 83 S.Ct. 1560]). [¶] California's Constitution, however, in provisions not dependent upon the federal Constitution (Cal. Const., art. I, §§ 4, 24),

---

public debate on the matter, including statements from Perumal and Read, the district decided the existing policy should remain unchanged.

[2] The flyer and yearbook advertisement are reproduced in the margin.

expresses the same sentiments: 'Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion.' (Cal. Const., art. I, § 4.) [¶] But California's constitutional provisions are more comprehensive than those of the federal Constitution (*Fox* v. *City of Los Angeles* (1978) 22 Cal. 3d 792, 796 [150 Cal.Rptr. 867, 587 P.2d 663]), and particularly so in the area of involvement of religion in schools. Thus, article XVI, section 5, in providing that 'Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose to help or to support or sustain any school, college, university . . . ,' 'forbids more than the appropriation or payment of public funds to support sectarian institutions. *It bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.*' (*California Educational Facilities Authority* v. *Priest* (1974) 12 Cal.3d 593, 605, fn. 12 [116 Cal.Rptr. 361, 526 P.2d 513].)" (*Bennett* v. *Livermore Unified School Dist.* (1987) 193 Cal.App.3d 1012, 1016-1017, emphasis added.)

California, pursuant to Education Code section 48907 insures students free speech rights provided there is no disruption of the educational process. But the statute also allows for school districts to promulgate their own lawful regulations and provides the students' rights may be restricted if the expression is in violation of those regulations.[3]

---

[3] The California Legislature defined the free speech rights of public school students in section 48907: "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials . . . and the right of expression

The district, pursuant to Education Code section 48907, enacted board policy 5133.1 prohibiting off-campus groups from functioning or advertising on campus.[4] But Peru-

---

in official publications, whether or not such publications or other means of expression are supported financially by the school or by the use of school facilities, . . ." The section permits expression to be restricted which may result in "the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school."

Section 48907 requires each school district to adopt reasonable written provisions "for the time, place, and manner of conducting such activities . . . ." Furthermore, it prohibits "prior restraint of material prepared for official school publications [including yearbooks] except insofar as it violates this section." The school district has the burden of showing justification for any limitation of student speech without undue delay.

[4] Board policy 5133.1 states in pertinent part: *"Clubs: School Sponsored.*

"Clubs recognized by the Board of Education are those which are sponsored by the individual schools of the district. Clubs shall be responsible to the school through which they are organized.

" . . .

" . . .

"School-sponsored clubs may be permitted to use official name of the school, to use building and other facilities, to have publicity in daily bulletins, bulletin boards and school publications, to wear identifying emblem but not special clothing, to sell on school premises tickets or bids to special activities sponsored by the club.

"No off-campus or private clubs are permitted to function in the school. They are also restricted from advertising in any form.

"The only clubs and organizations which may use school facilities during the school day are those which are school sponsored. The school day includes nonclassroom time." (pp. 1-2.)

Administrative Regulation 5133.1 states in pertinent part:

"1. *Responsibilities of the Principal* (continued)

"(d) The principal shall ascertain that all clubs sponsored by the school are not unlawfully selective nor discriminatory in membership selection nor in the conduct of their activities. Any incidence of unlawful selection or discriminatory conduct is to be dealt

mal and Read maintain because they are petitioning as individuals and not as members of groups, board policy 5133.1 is inapplicable. We disagree.

New Life falls within the plain and ordinary meaning of an "off-campus or private club." A group is a club when it advertises itself as an identifiable entity, promotes a common purpose, and solicits new members.

Webster's Third New International Dictionary (1971) at page 430, column 1, b(1), defines "club" as "an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically . . ."

New Life has always been identified by its specific name. In their correspondence with the district, Perumal and Read referred to their groups as New Life. The advertisements sought to be distributed and published promote "New Life at ETHS" and "Mission Viejo New Life."

Both New Life groups maintained leadership structures to effectively pursue the club's purpose and recruit new members. In their communications with the district, in-

---

with by causing the unlawful practice to cease or by disbanding the club.

"(e) The principal shall be responsible for making sure no off-campus, private, or non-sponsored clubs or organizations function on the campus during the school day, including break times, lunch, or other non-classroom time. These clubs or organizations may apply through the appropriate Use of Facility channels to use school facilities outside of the school day." (p. 2.)

"a. *Clubs: School Sponsored* (continued)

"3. *Freedom of Expression*

"Nothing in Board Policy 5133.1 nor Administrative Regulation 5133.1 shall be construed to be in opposition to students' rights of freedom of expression as specified in Education Code Section 48916 or Board Policy 5145.3 and 6144.1." (p. 3.)

cluding their requests to distribute literature, Perumal and Read referred to themselves as "president" of their respective groups. As Permual's and Read's advertisements indicated, the New Life groups met on specific days, at a specific time, and in a specific location. The meetings were not merely spontaneous lunch discussions.

Moreover, their proposed advertisements put to rest any lingering doubts. They provide information on the group known as "New Life" and a meeting schedule. They also state the purpose is "meeting other Christians," "studying the Bible," and "prayer." The New Life groups are private clubs within the commonly understood meaning of "off-campus or private club."

Board policy 5133.1 prohibits off-campus clubs from functioning or advertising on campus. The students argue board policy 5133.1 is vague and overbroad because it does not explain what an "off-campus or private club" is and therefore they do not know how to conform with the regulation. They also suggest they must, by definition, *not* be off-campus or private clubs because the district did not object to the New Life meetings until there was an attempt to advertise. Therefore, the New Life groups could not be off-campus or private clubs because advertising should not transform an otherwise permissible informal discussion group into an impermissible club.

But the students miss the point. New Life is a group, and not just because it advertises. And the fact the board has allowed the students to informally meet is of no moment. The district in enacting board policy 5133.1 changed from a limited open forum to a closed forum. But as the district acknowledges, interpersonal communication or informal discussions between students during the school day cannot be prohibited. And students may still organize, outside of the school setting, to conduct more formal discussions.

Seemingly, the yearbook presents a different issue; the school opened its advertising section to anyone who wished

to purchase space. The students rely on the Federal Equal Access Act of 1984. (20 U.S.C. § 4071.)[5] The Act applies to any public secondary school which receives federal financial assistance. However, the Act is irrelevant in the present case. It applies only to schools which have adopted a *limited open* forum policy. This school

---

[5] 20 U.S.C. section 4071 provides: "(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited [¶] It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. [¶] (b) 'Limited open forum' defined [¶] A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related students groups to meet on school premises during noninstructional time. [¶] (c) Fair opportunity criteria [¶] Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

"(1) the meeting is voluntary and student-initiated;

"(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

"(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

"(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

"(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."

We note at least one federal court has found application of the Federal Equal Access "Act would require an unconstitutional result." (*Clark* v. *Dallas Independent School Dist.* 671 F.Supp. 1119, 1124 (N.D. Tex. 1987.) In *Clark*, public high school students wished to conduct prayer meetings on a limited open forum campus. The court concluded the result demanded by the Act was constitutionally impermissible. "[E]stablishment clause interests of the [school] district prevail over the free exercise interests of the [students]." (*Id.*, at p. 1124.)

district as discussed, *ante*, has not. The district has chosen a closed forum and only school-sponsored clubs may function *or advertise*.[6]

III

A state or federal constitutional analysis brings no different result. Cases involving students' religious rights must be reviewed in the context of their First Amendment rights *and* the district's mandate to avoid violating the establishment clause of the First Amendment. "The free exercise clause of the federal Constitution embodies two rights: Freedom to believe and freedom to act. 'The first is absolute but, in the nature of things, the second cannot be.' [Citation.] Under the free exercise clause, freedom of conscience and freedom to adhere to such religious organizations or beliefs as the individual may choose is secured against governmental interference. [Citation.] This is not to say, however, that religion may be exercised wherever and whenever the adherent chooses. [Citations.] The inevitable consequence of the establishment clause when applied to religious ritual on school property is to restrict that activity to preserve the wall between church and state. ' "Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private." ' [Citations.]" (*Johnson* v.

---

[6] Moreover, the Act would apply only to students who "wish to conduct a meeting within that limited open forum." The students in placing the advertisement in the yearbook, wished to promote their group. Stated simply, the yearbook announcement was not a "meeting" and the students cannot rely upon the Act.

Huntington Union High Sch. Dist. (1977), 68 Cal.App. 3d 1, 16-17, fn. omitted.)

In *Johnson*, "(high school students) sought judicial relief from a refusal of the . . . [high school] (district) to permit a voluntary student Bible study club to meet and conduct its activities on the school campus during the school day." (*Id.*, at p. 6.) The court recognized "The precise question we must decide is whether school officials of a tax-supported high school of the district may permit plaintiffs' Bible study club to meet and [to] *conduct its activities* on the school campus during the school day ...." (*Id.*, at p. 11, emphasis added.)

In determining whether the school district was constitutionally required to bow to the student religious group's demands, the *Johnson* court relied on the tripartite test enunciated by the U.S. Supreme Court in *Lemon* v. *Kurtzman* (1971) 403 U.S. 602, 612-613 [29 L.Ed.2d 745, 755-756, 91 S.Ct. 2105]. "To pass constitutional muster the state activity must satisfy three conditions: (1) it must have a secular legislative purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. . . . Failure to meet any one of the three conditions is fatal to the constitutionality of state action. [Citations.]" (*Johnson* v. *Huntington Beach Union High Sch. Dist.*, *supra*, 68 Cal.App.3d 1, 11.)

The court addressed all three conditions, but adjudged the primary effect of allowing the Bible study club to meet and to conduct its activities would be to advance religion because "state financial support would flow directly to the club." (*Id.*, at p. 12.) It did "not rest [its] decision . . . on financial aid alone . . . [but acknowledged] . . .[t]his aspect of the effect test reaches the essence of the establishment clause proscription. . . . [I]mpermissible governmental support is present when the weight of secular authority is behind the dissemination of religious tenets." (*Id.*, at pp. 12-13, fn. omitted.)

Perumal and Read argue, and we acknowledge, many factual differences between the *Johnson* scenario and ours. The students in *Johnson* attempted to meet in a classroom and sought the services of a paid faculty sponsor. But we find the similarity of the student requests more convincing than the differences.

"Under the district's rules and regulations, the club will become an entity 'sponsored by the school' and as such will be entitled to use the school name in connection with its activities, to free use of school premises and property, to access to the school newspaper and school posting facilities to advertise its activities, and to solicit contributions on campus during the school day. *Thus, the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the religious objectives of the club.* The Bible study club would implicitly become an integal part of the school's extracurricular program conducted during the school day when students are compelled by law to attend the school." (*Id.*, at p. 13, fn. omitted, emphasis added.)

"The school permission sought by plaintiffs would meld the secular with the sectarian and would empower the Bible study club members to use the prestige and authority of the school in proselytizing their beliefs among students whose presence on the campus is compelled by law and who may be vulnerable to the pressure of an officially recognized student religious organization. This, the First Amendment will not permit." (*Id.*, at p. 15.)[7]

Nor does it matter that the religious activity was student initiated. In *Collins* v. *Chandler Unified School*

---

[7] The court, relying on section 4 of article I and section 5 of article XVI of the California Constitution also "conclude[d] that the California Constitution will not suffer school officials to permit plaintiffs' Bible study club to meet and conduct its activities on school campus durng the school day." (*Johnson* v. *Huntington Beach Union High Sch. Dist., supra,* at p. 16.)

Dist. (9th Cir. 1981) 644 F.2d 759, public high school students sought permission to open voluntary assemblies with prayer. The court found permission to do so would violate the Establishment Clause. The court concluded there is "no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." (*Id.*, at p. 761.) The Board cannot adopt a hands-off policy. It is mandated "to deny the use of school facilities to the students who shall voluntarily and upon their own initiative, perform such religious exercises . . . ." (*Id.*, at p. 762.)[8]

In *Brandon* v. *Board of Ed. of Guilderland Cent. Sch.* (2nd Cir. 1980), 635 F.2d 971, several high school students sought permission from their school principal to conduct communal prayer meetings on campus immediately before the school day commenced. "The group noted that it was not seeking supervision or faculty involvement, and stated that its activities were voluntary and would not conflict with other school functions." (*Id.*, at p. 973.)

The court found the students' free exercise of their rights were not significantly encumbered by the "District's refusal to permit communal prayer meetings to occur on school premises." (*Id.*, at p. 977.) The court noted even if those rights were limited, "an authorization of student-initiated voluntary prayer would have violated the Establishment Clause by creating an unconstitutional link between church and state." (*Id.*, at p. 978.)

The court was unimpressed with the students' argument they merely were "seek[ing] to exercise their rights to free speech in a public forum, unencumbered by

---

[8] The court relied on section 4 of article I and section 5 of article XVI of the California Constitution holding "[T]he state action . . . is proscribed . . . . [¶] [The state constitution] 'bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes.' [Citation.]" (*Johnson* v. *Huntington Beach Union High Sch.*, *supra*, at pp. 15-16.)

governmental regulation of the context of their 'speech.' " (*Id.*, at p. 980.) The court recognized "a high school is not a *'public forum'* where religious views can be freely aired. The expression of religious points of view, and even the performance of religious rituals, is permissible in parks and streets when subject to reasonable time, place, and manner regulations. [Citations.] The facilities of a university have also been identified as a 'public forum,' where religious speech and association cannot be prohibited. [Citations.] A high school classroom, however, is different [citation]. While students have First Amendment rights to political speech in public schools [Citation], sensitive Establishment Clause considerations *limit their right to air religious doctrines.* . . . [S]tudents' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context." (*Id.*, at p. 980, emphasis added.)

We conclude, therefore, that board policy 5133.1 is a constitutionally permissible school board regulation. It allows only school sponsored activities on its campus. It meets all prongs of the *Lemon* test and therefore does not contravene the establishment clause. Its enactment is secular, promoting the general well-being of the campus; because religious groups are not singled out for better or worse treatment, its principal or primary effect neither advances nor inhibits religion. No entanglement with religion exists.

So long as the district maintains a closed forum policy, it cannot constitutionally recognize New Life groups as school-sponsored clubs. The groups without such recognition may not hand out the flyers on campus nor may they advertise in the yearbook.

Judgment affirmed.

/s/ Sonenshine
SONENSHINE, J.

I CONCUR:

/s/ Wallin
WALLIN, Acting P.J.

MISSION VIEJO
NEW LIFE
- ARE YOU INTERESTED IN THE BIBLE?
- LEARNING ABOUT JESUS CHRIST?
- HELPING OTHERS THROUGH PRAYER?
- HAVING CHRISTIAN FRIENDS?
2 COR. 5:17
Therefore if any man is in Christ he is a new creature, the old things have passed away; behold new things have come."
....AND ITS FUN!
COME JOIN US AT THE STEPS OF THE P.A.T. EVERY WED. AT LUNCH.

New Life at ETHS

come one
come all

ARE YOU INTERESTED IN STUDING THE BIBLE ?

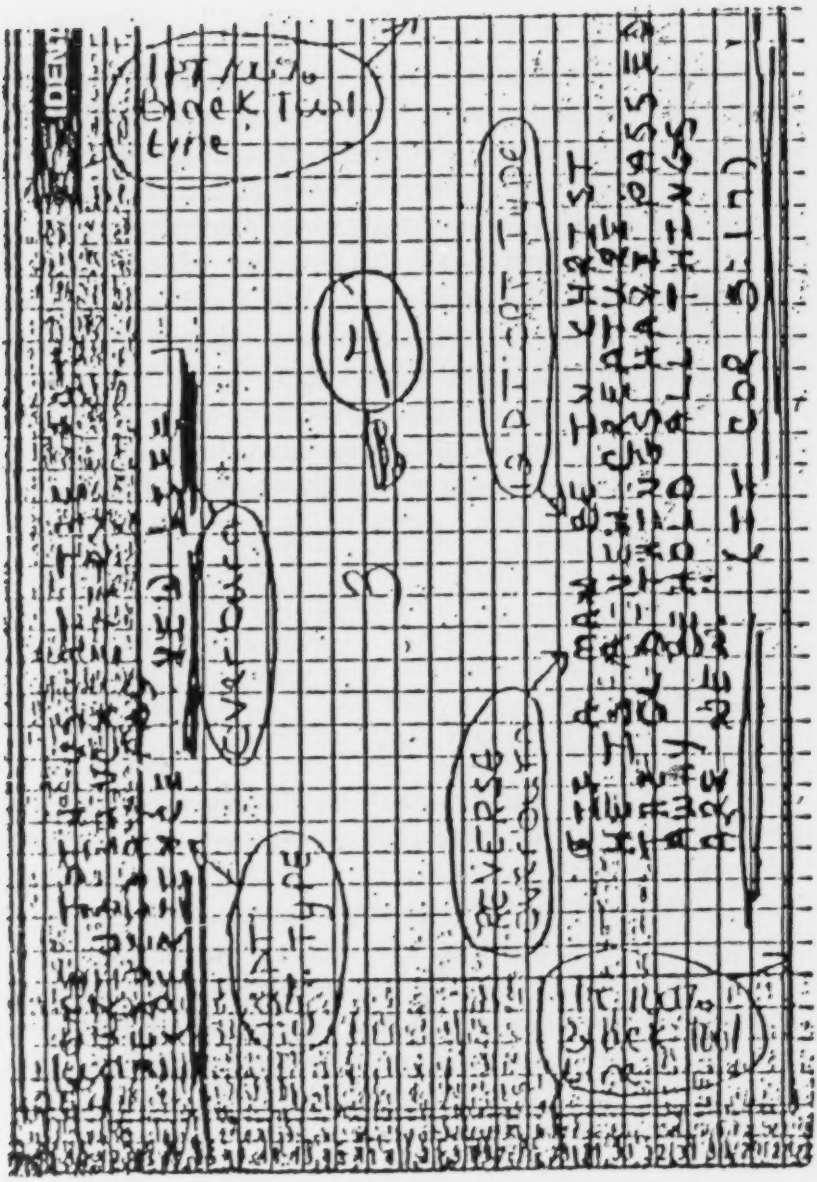
MEETING WITH OTHER CHRISTIANS AT SCHOOL ?

PRAYING FOR THE NEEDS OF OTHERS WHILE THEY PRAY FOR YOUR NEEDS ?

DEL TACO CAN WAIT, COME...

We meet every Tuesda and Thursday on the grass in front of the Library at Lunch.

When it rains we go into Mr. Vicker's Biology classroom



Crosby, J., dissenting.

I emphatically dissent from my colleagues' decision to uphold state suppression of student speech in this case. Ironically, in another opinion filed today we recognize the broad right of free expression accorded to high school editors of official campus publications under the law of California. (*Leeb* v. *DeLong* (Jan. 29, 1988, G002587) —— Cal.App.3d ——, 243 Cal.Rptr. 494) The specific expression at stake there consisted of a trivial little article in an April Fool's Day spoof edition of a high school newspaper accompanied by a picture of five coeds supposedly applying to pose nude in Playboy magazine. The issue was suppressed by the school district as potentially defamatory. *Leeb* holds a significant threat of a successful defamation action is one of the very few instances in which a school administration may censor its own student publications; it also notes that *no* such right exists with respect to the private publications of students merely because they are distributed on campus. (*Id.*, at p. —, 243 Cal.Rptr. 494.)

Here, by contrast, we deal with serious student expression having no discernible prospect of reflecting badly on the school, the district, or any particular student—much less of threatening a potential action for damages against the district—yet the majority of this panel unfortunately and unnecessarily restricts the rights described in *Leeb* in both school-sponsored and privately produced student publications, defending its action in the name of the First Amendment of the United States Constitution.[1] Petitioners may have "expected a civics lesson, but not the one the Court teaches them today." (*Hazelwood School District* v. *Kuhlmeier* (Jan. 13, 1988,

[1] The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

No. 86-836) —— U.S. ——, —— [slip opn., p. 15] (dis. opn. of Brennan, J.).)

"In God We Trust" graces every United States coin a child hands to the ice cream man, and public school students who choose to participate in chanting the flag salute announce that we are "one nation, under God . . . ." At the commencement of every session of the United States Supreme Court, the bailiff invokes the protection of the Almighty; and every justice of that court and every president in our country's history has been sworn into office with a hand on the Bible. And so on, and so on, and so on. Our Constitution does not seek to secularize society; it fosters tolerance.

The present majority, however, manages to treat the free expression of high school students during recess and a section of the yearbook devoted to paid advertisements as an anathema equivalent to the distribution of drugs or obscenity on campus or the broadcast of ship departures in wartime. This jarring invasion of fundamental liberties is required, we are told, simply because the students' expression purportedly was of a religious nature. But one person's "religious" expression is anther's trash. It is not up to school districts, courts, or anyone else to make such classifications, legally or morally, with respect to the unsubsidized musings and writings of private persons. These petitioners should have been left to distribute their harmless scraps of paper and run the innocuous little yearbook ad.

I would issue a writ of mandate to require the school district to treat so-called religious advertisements in the high school yearbook no differently from commercial speech in that forum and to cease interference with the distribution of New Life flyers, subject only to reasonable time, place, and manner restrictions.[2] In my opin-

[2] Although the yearbook has long since been published and petitioners have undoubtedly graduated, I agree the appeal should

ion, both the federal and state[3] Constitutions, Education Code section 48907,[4] and the spirit, if not the letter, of

---

not be dismissed for mootness, as the district argues. Where important constitutional rights are implicated and "the issue raised is of continuing public interest and likely to recur in circumstances where, as here, there is insufficient time to afford full appellate review . . . it is appropriate to resolve the matter . . . . (*John A.* v. *San Bernardino Unified School Dist.* (1982) 33 Cal.3d 301, 307; *Gordon J.* v. *Santa Ana Unified School Dist.* (1984) 162 Cal.App.3d 530, 533.)" (*Leeb* v. *DeLong, supra*, —— Cal.App.3d ——, —— [slip opn., p. 5].)

[3] The right to free expression contained in the California Constitution is more liberally construed than the First Amendment. (*Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658; *Leeb* v. *DeLong, supra*, —— Cal.App.3d —— [slip opn., p. 29, fn. 1].) Article I, section 2, subdivision (a) states, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Article I, section 4, provides, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

[4] Education Code section 48907 states, "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. [¶] Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction. [¶] Student editors of official school publications shall be

the Equal Access Act (20 U.S.C. § 4071 et seq.)[5] require the opposite conclusion.

---

responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section. [¶] *There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section.* School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section. [¶] 'Official school publications' refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee. [¶] Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school." (Emphasis added.)

In compliance with Education Code section 48907, the district has passed an implementing regulation, Board Policy 5145.2. (*See Leeb* v. *DeLong, supra,* —— Cal.App.3d ——, —— [slip opn., pp. 24-25].) It contains no provision specifically concerning religious speech.

[5] 20 U.S.C. section 4071 provides, "(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings. [¶] (b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time. [¶] (c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

"(1) the meeting is voluntary and student-initiated;

"(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

I

In this section of the discussion I examine the questions presented in light of the general constitutional heritage of this state's legislative scheme and will conclude that the district's responses find no blessing in that quarter.[6] In the section following, I will consider—and reject—the contention that the district's actions were

---

"(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

"(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

"(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."

[6] Although petitioners' brief on appeal appears to attempt to revive the effort to achieve equal on-campus status (see *Bender* v. *Williamsport Area School Dist.* (1986) 475 U.S. 534, —— [89 L.Ed.2d 501, 519] (dis. opn. of Burger, C.J.); *Widmar* v. *Vincent* (1981) 454 U.S. 263), the petition for writ of mandate was narrowly drawn. It sought only an order permitting distribution of the flyers and publication of one yearbook advertisement. My analysis is confined to those issues which, as the introductory paragraph suggests, essentially (although not entirely) cast this case in an establishment clause/free press context rather than as a clash of the establishment and free exercise clauses of the First Amendment and their California counterparts.

The latter case is surely on the horizon, however. (See, e.g., Ares, *Religious Meetings in the Public School: Freedom of Speech or Establishment of Religion?* (1987) 20 U.C.Davis L.Rev. 313 and cases cited at p. 314, fn. 3.) On-campus status for religious clubs was the issue the Supreme Court failed to reach on procedural grounds in *Bender*. Professor Ares sees an emerging rationale in that court favoring the free exercise clause over the establishment clause in the public schools but argues strongly against the notion of officially sponsored school meetings of religious groups. That issue was decided some time ago by Division Two in a manner consistent with Professor Ares' views. (*Johnson* v. *Huntington Beach Union High Sch. Dist.* (1977) 68 Cal.App.3d 1, cert. den. 434 U.S. 877.)

nonetheless compelled by the establishment of religion clauses of the federal and state Constitutions.

The most obvious difficulty is the content-based refusal to permit publication of the flyers and yearbook advertisement. Prior restraints are highly disfavored and may rarely be invoked in any circumstances. (Ed. Code, § 48907; *Near* v. *Minnesota* (1931) 283 U.S. 697; *Dailey* v. *Superior Court* (1896) 112 Cal. 94; but see *Hazelwood School District* v. *Kuhlmeier*, *supra*, —— U.S. —— [school administration may censor official high school newspaper without offending First Amendment].) As we noted in *Leeb*, "in the case of underground or unofficial [high school] publications . . . [t]he school is merely a distribution point and has neither a legal responsibility for content nor a corresponding right to censor . . . per Education Code section 48907. The power to regulate the time, place, and manner of expression cannot be converted into a right to control content." (*Leeb* v. *DeLong*, *supra*, —— Cal.App.3d at p. —, fn. 7 [slip opn., p. 18].) The district's argument to the contrary is a circular transformation of procedure into substance: The district's undoubted, and uncontested, right to manage its campuses does not confer an editorial license as well. (Ed. Code, § 48907; *Hazelwood School District* v. *Kuhlmeier*, *supra*, —— U.S. —— [slip opn., p. 12]; *Tinker* v. *Des Moines Independent Com. Sch. Dist.* (1968) 393 U.S. 503.)

Students have a broad right to publish their own *privately* produced writings on campus, and under Education Code section 48907 student distribution of such material may not be subjected to prior restraints. (*Ibid.*) The Legislature knows how to implement a prior restraint; and where it has specifically chosen not to do so, no such right may be implied. (*Bright* v. *Los Angeles Unified Sch. Dist.* (1976) 18 Cal.3d 450, 463-464.) Both school principals were certainly aware the flyers were produced, and to be distributed, by students. Thus, not-

withstanding the board policy, the district had no power to bar dissemination of the flyers under the law of this state. Whether their publication could have led to some sort of disciplinary action is another question (but the correct answer is, "No").

It is to be remembered that New Life meetings were tolerated as informal campus get-togethers of a type that would be difficult to prevent under the free association and free exercise clauses of the First Amendment. (See, e.g., *Bender* v. *Williamsport Area School Dist.*, *supra*, 475 U.S. at p. — [89 L.Ed.2d at p. 519] (dis. opn. of Burger, C.J.); *Widmar* v. *Vincent*, *supra*, 454 U.S. 263, 276; *Zorach* v. *Clauson* (1952) 343 U.S. 306.) They were not treated as improper reunions of off-campus clubs. Moreover, review of the flyers petitioners sought to distribute does not disclose a connection with any off-campus organization at all. Stripped of the hyperbole, they are simply announcements of voluntary lunchtime sessions to study the Bible, meet "other Christians," and engage in prayer. To the extent that the lead opinion attempts to defend its conclusion on Board Policy 5133.1, it is for this reason bankrupt. The questions presented in this case turn on no puny policy of a local school district; they are controlled by a reconciliation of the various clauses of the First Amendment and their state counterparts and nothing less.

Yearbook advertisements do appear in official publications and, consequently, are subject to the very narrow censorship right we recognized in *Leeb*. But nothing in Education Code section 48907 authorizes the prior restraint of any expression, religious or otherwise, unless it is obscene or defamatory or contains "material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations or the substantial disruption of the orderly operation of the school." This advertisement met none of those criteria.

The district argues the advertisement would violate the establishment of religion clauses of the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. 1, § 4; see *ante*, fns. 2 and 3.) But even if this contention were true (and I will conclude it is not), use of a prior restraint to ban mere religious speech is not constitutionally required; and it is specifically prohibited by Education Code section 48907.

Section 48907 only allows the suppression of material in official student publications which might incite *others* to a violation of a law or regulation. Its literal language does not include material which might *itself* offend some law or regulations, unless it is obscene or defamatory. High school students cannot transgress the establishment clause; only governments can. Thus, insofar as a potential violation of the establishment clause formed the basis for the censorship of the advertisement under the very limited power to impose prior restraints granted in section 48907, the district erred.

In denying publication of the advertisement, the Mission Viejo principal apparently believed it might create the "clear and present danger" of an unauthorized on-campus meeting of an off-campus club in violation of Board Policy 5133.1.[7] The contention is not tenable for several reasons. The school administration had never taken the position that New Life meetings violated any policy of the district.[8] Moreover, "[m]ere speculation on

---

[7] The same is true of the flyers. One of the two announced reasons for their prohibition was the implied determination that they might trigger an impermissible assemblage of an off-campus club: The identically phrased rejection letters to petitioners stated, "In that Board Policy 5133.1 is a 'lawful school regulation,' a student's exercise of free expression under Education Code Section 48907 would be inapplicable." The second reason was the district's claim that permitting their distribution would offend the establishment clause.

[8] Education Code section 48907 can be read, however, to imply a right to meet, discuss religion, and even to pray since it prohibits

the part of the state that individuals might at some time engage in illegal activity is insufficient to justify regulation. [Citation.]" (*San Diego Committee* v. *Governing Bd.* (9th Cir. 1986) 790 F.2d 1471, 1479 [high school newspaper which accepted military recruitment advertisements created a limited public forum and could not refuse to publish a paid message submitted by an antidraft group].) Also, the likelihood that an advertisement published in a yearbook at the end of the school year might have a significant impact on New Life attendance in the present or ensuing term is remote at best. Finally, New Life meetings were part of school life; there is no compelling reason why they should not have been allowed a small *paid* remembrance in the chronicle of the year's events.

In short, the yearbook ad did not fall within any of the prohibited statutory categories. Its acceptance by the student editor was the final word on the subject under California law. (Ed. Code, § 48907; *Leeb* v. *DeLong*, *supra*, at p. — [slip opn., p. 9]; cf. *Hazelwood School District* v. *Kuhlmeier*, *supra*, —— U.S. ——.) Consequently, the board's policy, as it was applied here, abridged Education Code section 48907's guarantee of freedom of student expression.

The first line of Board Policy 5133.1 prohibits the functioning of off-campus or private clubs in the school. The policy goes on to state, "They [off-campus and private clubs] are also restricted from advertising in any form." [9]

---

interference with student speech whether or not the "means of expression [is] supported . . . by use of school facilities." The constitutionality of such an interpretation is a question for another day.

[9] This can only be understood as referring to on-campus advertising. Read to ban off-campus advertising by off-campus clubs, the policy would clearly be beyond the lawful mission of a public school and repugnant to the First Amendment and article 1, section 2, subdivision (a) of the California Constitution.

I have no difficulty with a prohibition on outside organizations advertising on campus. A public high school is not constitutionally compelled to operate as the equivalent of a town square, so that nonstudents must be allowed to communicate with the students on campus. (Cf. *Robins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, aff'd. *sub. nom. Pruneyard Shopping Center* v. *Robins* (1980) 447 U.S. 74.)

Petitioners make no contrary argument. But they do insist without serious contradiction that they have no club membership at all, off-campus or otherwise, and are merely unorganized groups of students who meet during scheduled recesses. They also aptly note the district classified them as a club merely because board policy defines club as groups who advertise.[10]

Petitioners' criticism of this portion of the policy is well taken: Students who desire to advertise free-time meetings may not be converted ipso facto into impermissible "clubs" based on that fact alone. As applied to *students* of the school, such an interpretation of Board Policy 5133.1 would hopelessly conflict with Education Code section 48907: "Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials [], . . . and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities . . . ." Using a "Through the Looking Glass" technique of defining an exercise of the rights conferred in Education Code section 48907 as an act of an off-campus or private club, the district has, in effect, re-

---

[10] The district played both sides of this particular street, and petitioners now attempt to do the same. As noted above (see fn. 6), Perumal and Read *previously* desired official club status; but the district consistently refused to grant it.

pealed a legislative enactment. This, of course, it may not do.

Translated, school policy permits students to discuss whatever they wish during the lunch period so long as they do not announce the meetings in advance. Not surprisingly, apart from establishment clause theory, the district fails to cite any authority in support of its right to formulate such a rule; and I have discovered none.

II

Was the district compelled by the establishment clauses of the federal and state Constitutions to take the various actions contested here despite the free press rights of the students and the literal language of Education Code section 48907? I think not.

The plight of the district and its elected trustees is understandable. Beset by community pressure from advocates on both sides of the question, they have quite properly sought to steer a course of strict neutrality toward on-campus religious expression.[11] If any guiding principle has received general support in our highest court, it is this: "[T]o withstand the strictures of the Establishment Clause there must be a secular . . . purpose and a primary effect that neither advances *nor inhibits religion.*" (*School District of Abington TP., PA.* v. *Schempp* (1963) 374 U.S. 203, 222, emphasis added.) And the trustees were required to develop a policy in the legal context of what former Chief Justice Burger

---

[11] I say "properly" because "strict neutrality" is one of the phrases most often used to describe the correct posture of a school district toward religion in public schools. The idea is not without cogent critics, however: "Paradoxically, the neutrality principle not only requires hostility to religion at odds with the values of the Free Exercise Clause, but also permits aid to religion in conflict with values of the Establishment Clause." (Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict* (1980) 41 U.Pitt.L.Rev. 673, 689.)

rather aptly labeled the Supreme Court's "embarrassing Establishment Clause jurisprudence. . . ." (*Edwards* v. *Aguillard* (1987) 482 U.S. ——, —— [96 L.Ed.2d 510, 555] (dis. opn. of Burger, C.J.).)[12] Cases similar to the present one have repeatedly confounded and sundered the membership of that court, as an examination of the various opinions and authorities cited in *Edwards* will attest. (See also Choper, *The Religion Clauses of the First Amendment, supra,* 41 U.Pitt.L.Rev. 673.)

Over the years courts have rejected numerous attempts by public school students to conduct formal Bible study and religious meetings on campus, usually determining the proposed student activity would impermissibly engage the state with religion. But it is also beyond cavil that "freedoms of speech and of press, of assembly, and worship may . . . be infringed . . . . only to prevent grave and immediate danger to interests which the state may lawfully protect." (*West Virginia State Board of Education* v. *Barnette* (1943) 319 U.S. 624, 639; see also *San Diego Committee* v. *Governing Bd., supra,* 790 F.2d at p. 1478.) It is difficult to visualize purely student produced handbills or yearbook advertisements of a religious bent in terms of "grave and immediate danger." That sort of hysteria is generally reserved for the treatment of religious questions behind the Iron Curtain. In this country the state may not "lawfully protect" stu-

---

[12] Dean Choper describes the Supreme Court's establishment clause as a "conceptual disaster area." (Choper, *The Establishment Clause and Aid to Parochial Schools— An Update* (1987) 75 Cal. L.Rev. 5, 6.) In another article he pointedly comments on the Supreme Court's own indictment of its rulings on this subject: "Indeed, in an unusually candid recent dictum, the Court forthrightly conceded that its approach in this area 'sacrifices clarity and predictability for flexibility' [citing *Committee for Pub. Educ.* v. *Regan* (1980) 444 U.S. 646, 662]—a euphemism, I suggest, for expressly admitting the absence of any principled rationale for its product." (Choper, *The Religion Clauses of the First Amendment, supra,* 41 U.Pitt.L.Rev. at p. 681.)

dents from the free expression of their classmates unless, at a minimum, it presents a clear and present danger that the educational mission of the school might be adversely affected. (*Tinker* v. *Des Moines Independent Com. Sch. Dist., supra,* 393 U.S. 503.) No such extreme situation exists here, of course.

The key to the establishment clause decisions as they relate to public schools and student religious activity, if there is one, appears to be this: Who has initiated and sponsored that activity? If the state is the moving force, the establishment clause is almost invariably held to be offended. If the impetus is, as here, from the students themselves, or their parents perhaps, and the taxpayers' facilities are not unduly or unusually utilized, other First Amendment values may win out.[13] (See, e.g., 20 U.S.C. § 4071.)

Indeed, one commentator has noted, "The claim for some religious activity in the public schools is truly forceful only in the free speech claims of those seeking to engage in their own religious practices without governmental leadership. Even then, however, the claim is convincing only where the state allows, or is compelled

---

[13] Examples of impermissible state action designed to promote religion are the following: *Edwards* v. *Aguillard, supra,* 482 U.S. —— [96 L.Ed.2d 510] [statute required teaching of "creation science" if school elected to teach theory of evolution]; *Grand Rapids School Dist.* v. *Ball* (1985) 473 U.S. 373 [use of public school teachers to instruct parochial school pupils in nonpublic school classrooms "leased" to the school district]; *Wallace* v. *Jaffree* (1985) 472 U.S. 38 [use of religious school teachers in public schools]; *Stone* v. *Graham* (1980) 449 U.S. 39 [required posting of Ten Commandments in public classroom]; *Epperson* v. *Arkansas* (1968) 393 U.S. 97 [teaching of evolution forbidden by statute]; *School District of Abington TP., PA.* v. *Schempp, supra,* 374 U.S. 203 [requirement that school day begin with Bible readings]; *Engel* v. *Vitale* (1962) 370 U.S. 421 [recitation of prayer in classroom]; *Illinois* ex. rel *McCollum* v. *Board of Education* (1948) 333 U.S. 203 [use of religious school teachers in public school curriculum 30 minutes each week].

to allow, comparable non-religious speech to be exercised. In such cases, denial of the right of a religious group to speak constitutes content-based discrimination and would be subject to first amendment (speech) and equal protection scrutiny." (Marshall, "*We Know It When We See It*"[:] *The Supreme Court and Establishment* (1986) 59 So.Cal.L.Rev. 495, 543, fn. omitted; see also Choper, *The Religion Clauses of the First Amendment, supra*, 41 U.Pitt.L.Rev. at p. 686, fn. omitted ["The Court's apparent inconsistency may be rationalized by concluding that its Establishment Clause principles simply give way in the face of a serious (or even arguably substantial) Free Exercise Clause claim."].) *Tinker* v. *Des Moines Independent Com. Sch. Dist., supra*, 393 U.S. 503 and Education Code section 48907 compel the district to permit distribution of student generated flyers, and the Mission Viejo High School's administration allowed the yearbook to accept commercial advertisements. Thus, both of Professor Marshall's conditions are satisfied in this case. Petitioners' "serious" free exercise argument meets Dean Choper's test as well.

Zorach v. *Clauson, supra*, 343 U.S. 306 is an important illustration of a permissible school regulation which attempted to accommodate student and parent initiated religious exercises. There the Supreme Court approved a New York City program permitting public schools to release students to attend religious instruction or services. Although the facts are not directly on point, the court's language appears to be: "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public

service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." (*Id.*, at pp. 313-314.) Nor do I.

Zorach is hardly unique in establishment clause jurisprudence. The Supreme Court has frequently upheld laws against such attacks, even where the state has gone beyond accommodation to the point of financial assistance. (*Hobbie* v. *Unemployment Appeals Commission* (1987) 480 U.S. —— [94 L.Ed.2d 190]; *Witters* v. *Washington Dept. of Serv. for the Blind* (1986) 474 U.S. 481; *Lynch* v. *Donnelly* (1984) 465 U.S. 668; *Widmar* v. *Vincent, supra*, 454 U.S. 263; *Thomas* v. *Review Bd. of Indiana Employment Sec.* (1981) 450 U.S. 707; *Wisconsin* v. *Yoder* (1972) 406 U.S. 205; *Walz* v. *Tax Commission of City of New York* (1970) 397 U.S. 664; *Board of Ed. of Cent. Sch. Dist. No. 1* v. *Allen* (1968) 392 U.S. 236; *Sherbert* v. *Verner* (1963) 374 U.S. 398; *McGowan* v. *Maryland* (1961) 336 U.S. 420; *Everson* v. *Board of Education of Ewing TP.* (1947) 330 U.S. 1.)

I am, of course, aware the present case falls somewhere between *Zorach* and those in which religious training was imported into public school classrooms. Here, the flyers were to be distributed in common areas on school grounds during student free time and the advertisement was to appear in a section of the high school yearbook devoted to paid announcements. It cannot fairly be said that either mode of expression was under the

supervision or sponsorship of the school in any real sense, however. The flyers were published by students, and the advertisement was written by a student for placement in a portion of the yearbook that *belonged to him* as payment for services as a member of its staff and accepted for publication by the student editor.

The correct interpretation of *Zorach* is this: It is "the combination of classroom and mandatory instruction which was held to be constitutionally impermissible [in *Illinois* ex rel. *McCollum* v. *Board of Education*, *supra*, 333 U.S. 203], the implication being, if *accommodation only* was involved, that religious activity could permissibly occur on the school grounds." (*Johnson* v. *Huntington Beach Union High Sch. Dist.*, *supra*, 68 Cal.App.3d at p. 22 (dis. opn. of McDaniel, J.).) One of the leading scholars in the field, Jesse H. Choper, currently Dean of the School of Law at the University of California at Berkeley (Boalt Hall) came to the same conclusion years ago. (Choper, *Religion in the Schools: A Proposed Constitutional Standard* (1963) 47 Minn.L. Rev. 329, 351-355.)

No discussion of establishment clause problems can be complete without reference to *Lemon* v. *Kurtzman* (1971) 403 U.S. 602. There, the United States Supreme Court created a tripartite test to deal with establishment clause issues. Although it has been frequently criticized by dissenters, the "test has been applied in all cases since its adoption in 1971, except in *Marsh* v. *Chambers*, 463 U.S. 783, 77 L.Ed.2d 1019, 103 S.Ct. 3330 (1983), where the Court held that the Nebraska legislature's practice of opening a session with a prayer by a chaplain paid by the State did not violate the Establishment Clause. The Court based its conclusion in that case on the historical acceptance of the practice. Such a historical approach is not useful in determining the proper roles of church and state in public school, since free public education was virtually nonexistent at the time the Constitution was

adopted. [Citations.]" *Edwards* v. *Aguillard*, *supra*, 482 U.S. at p. —, fn. 4 [96 L.Ed.2d at pp. 518-519].)

State action, per *Lemon*, violates the establishment clause if it fails to satisfy *any* of three conditions: It "must have a secular [] purpose[,] . . . its . . . primary effect must [] neither advance[] nor inhibit[] religion, [and it] must not foster 'an excessive government entanglement with religion.'" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at pp. 612-613.) This test should not be viewed as an absolute, however, "but as a touchstone with which to identify instances where the objectives of the establishment clause have been compromised. [Citation.]" (*Johnson* v. *Huntington Beach Union High Sch. Dist.*, *supra*, 68 Cal.App.3d at p. 11.) The goal of the establishment clause is "to protect against . . . 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' [Citations.]" (*Ibid.*)

The actions taken here violate the first two *Lemon* conditions, apparently in an effort to comply with the third. The district's motives in suppressing the flyers and the advertisement were obviously calculated to restrain petitioners' on-campus religious expression, and there can be no doubt its actions accomplished precisely that. The district argues it had a secular purpose, of course; but at the same time it now defends its decisions in part, as it did previously, on the basis they were necessary to avoid entanglement with religion. These contentions are hopelessly inconsistent in my view.

Nonetheless, assuming no violation of the first two *Lemon* conditions for the sake of argument, I address the "entanglement" claim in light of petitioners' statutory and state constitutional freedom to publish. The district continues to rely on *Johnson*, the case cited in the principal's letters denying circulation of the flyers. The present facts are considerably different, however. There, a student group petitioned for permission to form an official school sponsored Bible club, requesting use of educational

facilities and supervision. Employing the *Lemon* test, the majority of the court concluded operation of the club would advance religion. Noting "the exercise of the power to permit student organizations to conduct their activities on school campuses during the school day in accordance with district rules and regulations is in the abstract secular in nature," the court nevertheless concluded the financial subsidy received by the group in the form of classroom space, heat, light, and a faculty sponsor might be sufficient in itself "to compel constitutional condemnation of the requested state action." (*Id.*, at p. 12.)

But the *Johnson* opinion was not based simply on the provision of financial aid. (*Ibid.*) The court was also greatly concerned that the district would be placing "its imprimatur upon the religious activity. [Citations.]" (*Id.*, at p. 13.) The court added, "it is in the foregoing respect that permitting [the] Bible study club to meet and [to] operate on the school campus during the school day most offends establishment principles. Under the district's rules and regulations, the club will become an entity '*sponsored by the school*' and as such will be entitled to use the school name in connection with its activities, to free use of the school premises and property, to access to the school newspaper and school posting facilities to advertise its activities, and to solicit contributions on campus during the school day. Thus, the consequence of permitting the club to operate on campus as a recognized student organization is to place school support and sponsorship behind the religious objectives of the club. The Bible study club would implicitly become an integral part of the school's extracurricular program conducted during the school day when students are compelled by law to attend the school." (*Ibid.*, fn. omitted, emphasis added.)

The court concluded the club's activities would lead to excessive involvement with religion and could create a "potential for divisiveness" among the students in their religious beliefs: "[T]here is a real possibility that competing sects or beliefs will vie for school permission to

operate on campus. Manifestly this could engender student divisiveness in matters of religious beliefs." (*Id.*, at p. 14.)

Our facts are dissimilar, of course. Here we deal only with innocuous and inoffensive writings no student is required to read. The modern high schooler has been besieged from birth with commercial and religious advertisements of all kinds. Television, radio, and newspapers inundate our youth with such material day and night, along with major doses of sleazy sex and gruesome violence. Even the most gullible high school student must have been thoroughly desensitized long ago to a media deluge that is heavily directed to influencing youthful thinking—and spending. Against the backdrop of these realities, the rights of these petitioners to say what they will, in my view, far outweigh the minor inconvenience to fellow students not interested in their message. The latter need only refuse an unwanted flyer or drop it in the trash.

The majority's belief that government officials can prevent a student from handing a piece of paper to another student during a recess simply based on the allegedly religious nature of the words it contains is without precedent, principled logic, or any serious constitutional justification. It would permit government agents, educators at that, to assume the role of " 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position." (*Hazelwood School District* v. *Kuhlmeier*, *supra*, —— U.S. ——, —— [slip opn., p. 17] (dis. opn. of Brennan, J.).)

Not only does the district have no business inquiring into the content of such materials, despite the limited right to regulate the time, place, and manner of their distribution to prevent interference with its legitimate educational objectives, the district has absolutely no mission to secularize the thinking or expression of its charges. To the contrary, our law, inconsistent as it

has been in this area, has almost always sought to accommodate the religious expression of its citizens in the multitude of arenas in which the government must also appear; and this has been true even in the public schools.

When students refuse to participate in the flag salute for religious reasons, the school must tolerate this viewpoint *in the classroom.* (*West Virginia State Board of Education* v. *Barnette, supra,* 319 U.S. 624.) The state must even tolerate the religious heritage of students to the extreme of excusing them from compulsory attendance. (*Wisconsin* v. *Yoder, supra,* 406 U.S. 205.) The correct principle is this: "[*T*]*he Establishment Clause should forbid only government action whose purpose is solely religious and that is likely to impair freedom by coercing, compromising, or influencing religious beliefs.*" (Choper, "The Religion Clauses of the First Amendment," *supra,* 41 U.Pitt.L.Rev. at p. 675.) Here, of course, the only *government* action involved was obviously directed toward the impermissible goal of preventing student religious expression.

Since my colleagues' holding with respect to the flyers is so wide of the constitutional mark, despite giving the matter considerable research, thought, and study, those without similar luxuries are likely to be even more confused. For the benefit of the public at large, and even the usual audience of attorneys and judges, I believe it may be instructive to strip the matter of its legal patina and briefly digress into a few simple illustrations of the grievous error the majority commits today.

Suppose a solitary 18-year-old high school student eating his lunchtime apple under a schoolyard oak. Inspired, for whatever reason, our imaginary scholar has a passing religious thought just as the principal walks by. Good thought policeman that he is, our hypothetical administrator reads the student's mind and, horrified that school premises are being used for religious purposes, expels the contemplative lad. Lawful? Of course not.

The next day, another 18-year-old student previously unknown to the first sits beside him and begins his lunch. A discussion ensues concerning the same religious idea. The principal overhears this conversation and, horrified again, expels one or both of the students. Lawful? Of course not.

On the third day, the students are more careful. Now they communicate by hastily scrawled notes containing biblical passages which they merely show to each other but do not physically transfer. They are expelled. Is this lawful? Obviously not.

On the fourth day, our scholars pass their notes back and fourth. May they be punished for that? Of course not.

On the fifth day, they are less secretive. They allow passing students to satisfy their curiosity by reading the notes over their shoulders. Is this grounds for discipline? The idea is ludicrous.

On the sixth day, the students leave copies of the notes under the tree while they consume their lunch. Other students help themselves to the copies. The principal expels everyone who takes one and, of course, our two imaginary students. The action is clearly improper.

On the seventh day, there is no rest. Buoyed by their success in defeating the principal in six consecutive mandate proceedings, our pious scholars pass out flyers during recess inviting others to meet them under the tree at lunch, which flyers also contain a quotation from the Bible. Every student who receives one is greatly offended and is put to the inconvenience of depositing the flyer in a waste container in order to comply with campus litter regulations. The principal has had enough. This time he orders the students to stop what they are doing, although he can find nothing wrong with the time, place, and manner of their activity. Can he do this? The majority says, "Yes." The Constitution (and I) say, "No."

Of course, I realize that another 30 days worth of examples might bring us to a full-blown religious service as a daily requirement for all students. A line certainly does exist beyond which petitioners and the district may not pass; but that line is to be drawn at the exact point, although it may not always be easy to find, where the district lends its support, moral or material, to students seeking to promote religious expression, not where the majority draws it today. The line *might* even be drawn where students seek to distribute material generated by non-students, such as the Bible, the Koran, the Book of Mormon, Dianetics, Watchtower, or any other revealed truth or tract produced by outside religious organizations. I regard that as an exceedingly close question, but the one before us today is very much different.

As to the yearbook, its advertisement section contains messages from a major real estate developer, bicycle shop, attorney, hair salon, pet store, ice cream parlor, florist, chiropractor featuring acupressure, orthodonist, auto insurance company, and several student groups that look suspiciously like off-campus clubs, among a number of others.[14] The school district obviously endorses none of these businesses or organizations merely because their messages appear in the book. I cannot imagine who but the most virulent anti-religionist could be offended by the inclusion of a New Life ad among such material.

There are also several reasonable options for someone who might find New Life material offensive. The yearbook is hardly required reading; no one has to order the book or retain it if he does. Disfavored pages may be ignored. Nor is it even necessary to retain a page containing any particular advertisement. The ads are all grouped in one section, and any or all could be quickly excised without affecting the remainder of the book.

---

[14] We required augmentation of the record on our own motion to include a copy of the yearbook in its final form. (Code Civ. Proc., § 909.) Neither side accepted our invitation to file an objection to the order, if any it had.

Thus, the yearbook is wholly dissimilar to other activties in which religion is foisted on a captive audience under circumstances where the school might be perceived to sponsor its introduction. (See, e.g., *Bennett* v. *Livermore Unified School Dist.* (1987) 193 Cal.App.3d 1012 and *Collins* v. *Chandler Unified School Dist.* (9th Cir. 1981) 644 F.2d 759, cert. den. *sub. nom. Chandler Unified School Dist.* v. *Collins*, 454 U.S. 863 [not proper to open assemblies with prayer where such gatherings were part of major school functions requiring faculty supervision and school facilities].)

Moreover, while the yearbook is a limited forum, its advertising section is a public forum because commercial speech has been allowed entry. (*Leeb* v. *DeLong*, *supra*, —— Cal.App.3d at pp. —-— [slip opn., pp. 11-12]; *Pines* v. *Tomson* (1984) 160 Cal.App.3d 370; *San Diego Committee* v. *Governing Bd.*, *supra*, 790 F.2d at pp. 1476-1478). Religious worship and discussion are "forms of speech and association protected by the First Amendment" (*Widmar* v. *Vincent*, *supra*, 454 U.S. at p. 269), and they may be treated no less. (see 20 U.S.C. § 4071 and *Laguna Publishing Co.* v. *Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 841 [discriminatory limitations on free speech on public property not permissible].) In *Widmar* the United States Supreme Court flatly rejected the notion "that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." (*Widmar* v. *Vincent*, *supra*, 454 U.S. at p. 274, fn. 6.)

I am mindful that the United States Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or

her family. Students in such institutions are impressionable and their attendance is involuntary. [Citations.]" (*Edwards* v. *Aguillard*, *supra*, 482 U.S. at p. — [96 L.Ed.2d at p. 519].)

Nonetheless, as many parents learn to their delight or despair, depending on the perceived qualities of their offspring's friends, it is impossible to isolate students from one another. Here, it is not the district who seeks to influence its charges, but fellow students.[15] And the latter enjoy constitutional freedoms the district does not.

In summary, few of the dangers carefully catalogued in *Johnson* v. *Huntington Beach Union High Sch. Dist.*, *supra*, 68 Cal.App.3d 1 are present here. The flyers required no financial subsidy of any kind. The yearbook ad was purchased by petitioner Read through his own labor on the journal's staff. Moreover, a school does not impliedly approve the content of privately produced flyers or advertisements by simply failing to ban their publication. If the administration is truly troubled by such concerns, it is perfectly free to announce that the law compels student expression on campus within the limits of Education Code section 48907 and that no endorsement of such expression is to be inferred by its compliance with the law. A disclaimer in that vein may also be published in official school publications. (*Hazelwood School District* v. *Kuhlmeier*, *supra*, —— U.S. at —— [slip opn., p. 13] (dis. opn. of Brennan, J.) [The administration, too, must be permitted access to its own forum.]) In other words, the solution, as it generally is in free speech matters, is not to restrain expression but to answer speech with more speech.

---

[15] " '[A]lthough "you send your child to the schoolmaster . . . 'tis the schoolboys who educate him." [Emerson, The Conduct of Life (1860) at p. 123.]' " (Choper, *Religion in the Schools*, *supra*, 47 Minn.L.Rev. at p. 416, fn. omitted.) Although Dean Choper would not allow the *state* to "engage" in religion in the schools under his proposed constitutional standard, his definition of "state" does not include the students themselves. (*Id.*, at pp. 330-331, fn. 6.)

Unlike the situation in *Johnson*, these petitioners sought no official recognition of the New Life discussions in the proceeding below. (See fns. 6 and 10, *ante*.) They did not request use of the schools' names, other than to identify the location of their meetings; nor did they pursue free reign on the school's premises.

Tinker v. *Des Moines Independent Com. Sch. Dist.*, *supra*, 393 U.S. 503 provides them solid support. In *Tinker* students protesting the Vietnam War donned black armbands in direct violation of school policy and were suspended until they agreed to remove this apparel. The Supreme Court concluded the school restriction violated the students' constitutional rights to free expression, "at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. [Citations.]" (*Id.*, at p. 513.) The court found the school failed to make such a showing.

Certainly, had the school acted differently in *Tinker* it could not have been accused of endorsing student opposition to the Vietnam War by implication. A similar ill-conceived viewpoint motivated the district here, a viewpoint which either misconstrued a difficult legal point or unnecessarily underestimated the sophistication and intelligence of the typical high school student who "should be able to appreciate that the [school's] policy is one of neutrality toward religion." (*Widmar* v. *Vincent*, *supra*, 454 U.S. 263, 276.) It is at least as important that our schools be politically neutral as it is that they be neutral toward religion, yet *Tinker* protected student political expression of the most controversial sort.

Finally, I am not convinced that the mere distribution of a flyer will lead to student "divisiveness," one of the *Johnson* decision's concerns. The district admits the lunchtime discussions have never caused any disturbance. How could their mere announcement? Should such "divisiveness" in fact surface, however, the school district could seek to justify the use of censorship at that time,

for then it might legitimately claim religion had interfered with the educational mission of the school. Until then it should tolerate the students' right to free thought and expression.

Similarly, there is no evidence the yearbook advertisement or the flyer would materially interfere with the operation of the school or the rights of other students. Nothing in the record suggests students harboring different or opposing viewpoints are, or will be, vexed in any way. In fact, "[t]here is here no evidence whatever of [the student's] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students." (*Tinker* v. *Des Moines Independent Com. Sch. Dist.*, *supra*, 393 U.S. at p. 508.)[16]

Moreover, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength . . . ." (*Ibid.*) Religious speech is entitled to no less forbearance.[17]

---

[16] The school board would, perhaps, be further annoyed by the regeneration of strong community feelings over the matter; but that is hardly a reason to stifle student expression. Elected officials must suffer such difficulties as part of the job; and, in any event, the blame is not, or would not be, attributable to them in this case.

[17] One of the more astute passages I have encountered in the literature on the general subject before us is the following: "With all due respect to the adversaries, the church-state issues that

The bigotry involved in the suppression of purely private student religious expression cannot be reconciled with any of the clauses of the First Amendment. It is as offensive to the establishment clause as any of them. The majority does not bar entry of the camel's nose of religion into a public institution by today's decision. New Life meetings presumably go on. But the majority does allow the whole camel to intrude into the students' tent of free expression. I would reverse and order a writ to issue consistent with the views expressed above.

CROSBY, J.

---

have roiled the courts and the nation have not been earth-shaking matters. They are worrisome only for the same reason that it is desirable to keep the camel's nose outside the tent. But behind the petty quarrels there is a fundamentally important principle at stake, which cannot be too often compromised without being lost. What is at venture in the cases denominated church and state are not the picayune governmental expenditures or religious blasphemies involved in state sponsored religious symbols or school prayers. What is at issue is nothing less than preserving the freedom of the individual mind. The preservation of that freedom is the reason behind the first amendment, not only its religion clauses but its speech and press and petition and assemby provisions as well. And in this area, the greatest danger lies in the attempts by adults, who have closed their own minds, to close the minds of others, especially children, through the instruments of government sanctions. Of course, the young are the most vulnerable to indoctrination. But the histories of every European nation, some well into the twentieth century, and not excluding England, have taught us that it is not only the young who are vulnerable to the coercion of religious bigotry. [¶] It is the constitutional objective of freedom of the mind that should inform the construction of the application of the constitutional provisions that come before the Court. Principled decisions, not what Mr. Justice Schaefer used to call 'pots and pans jurisprudence,' must be its guide." (Kurland, *Religion and the Constitution: "Eternal Hostility Against Every Form of Tyranny Over the Mind of Man"* (1987) 20 U.C.Davis L.Rev. 705, 717.)

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G003181

(Super. Ct. No. 45-78-95)

ALEXANDER PERUMAL and FREDERICK RUSSELL READ,
a Minor, etc.,

Appellants,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT *et al.*,

Respondents.

ORDER MODIFYING DISSENTING OPINION

[Filed Feb. 19, 1988]

The dissenting opinion in the above-entitled matter, filed and certified for publication on January 29, 1988, is ordered modified as follows:

(1) On page 14 of the slip opinion, line 10, "(dis. opn. of Burger, C.J.)." is deleted and "(dis. opn. of Scalia, J.)." is substituted in its place.

(2) On page 25 of the slip opinion, line 7, the following sentence is inserted after the sentence which ends, "at p. 675.)": "This principle should be fully applicable in public schools. (Choper, *Church, State and the Supreme Court: Current Controversy* (1987) 29 Ariz.L.Rev. 551, 554-556.)"

CROSBY, J.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G003181

(Super. Ct. No. 45-78-95)

ALEXANDER PERUMAL and FREDERICK RUSSELL READ,
a Minor, etc.,

Appellants,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT *et al.*,

Respondents.

ORDER MODIFYING DISSENTING OPINION

[Filed Feb. 29, 1988]

The dissenting opinion in the above-entitled matter, filed and certified for publication on January 29, 1988, is ordered modified as follows:

(1) On page 14 of the slip opinion, line 7, "Justice Scalia and" is inserted immediately before "Chief Justice Burger".

CROSBY, J.

APPENDIX B

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division Three

Office of the County Clerk
Orange County
700 Civic Cntr. Dr. West
Santa Ana, CA. 92701

RE: PERUMAL, ALEXANDER

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DIST.
G003181
Orange County No. 457895

REMITTITUR

I, Stephen M. Kelly, Acting Clerk of the Court of Appeal For the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on January 29, 1988, and that this opinion or decision has now become final.

—— Appellant X Respondent to recover costs.

—— Each party to bear own costs.

—— Costs are not awarded in this proceeding.

Witness my hand and the seal of the court affixed this May 18, 1988.

[SEAL]

By: /s/ William Hyman
Deputy Clerk

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK

PERUMAL et al., Minors, etc.

v.

SADDLEBACK VALLEY UNITED SCHOOL DISTRICT *et al.*

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 3, No G003181
S004753

[Filed Apr. 27, 1988]

Appellants' petition for review is DENIED.

Broussard, J. is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice

APPENDIX D

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ORANGE

Dept. 25

Court convened at 4:00 P.M. July 1, 1985, present Hon. PHILIP E. SCHWAB, Judge; Arturo E. Guevara, Deputy Clerk; None, Deputy Sheriff; None, Reporter; and the following proceedings were had:

45-78-95 PERUMAL, ET AL. vs. SADDLEBACK VALLEY UNION SCHOOL DIST. No appearances. This matter having previously on June 24, 1985 been taken under submission rules as follows: Petition for Writ of Mandate damages and attorney fees denied. Each party to bear their own costs ENTERED 7-1-85

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A88-48

ALEXANDER PERUMAL, *et al.*,
Applicants

v.

SADDLEBACK VALLEY SCHOOL DISTRICT, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for writ of certiorari and/or for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including August 25, 1988.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 21st day of July, 1988.

APPENDIX F

RELEVANT STATUTORY PROVISIONS AND SCHOOL BOARD POLICIES

The State of California Education Code, § 48907 provides in relevant part:

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions . . . and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities . . . .

Saddleback Valley Unified School District Board Policy Nos. 5145.3 & 6144.1 provide, in relevant part:

Right of Free Expression

Students of the District shall have the right to exercise free expression including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, and the wearing of buttons, badges, and other insignia.

Circulation of Petitions, Circulars, Newspapers, and Other Printed Matter Not Published Under School Authority

Students shall be allowed to distribute petitions, circulars, leaflets, newspapers, and other printed matter subject to the following specific limitations:

Manner—the manner of distribution shall be such that:

1. No materials included in this section may be distributed in the classrooms, nor in such a manner as to disrupt the period between classes, and must be dis-

tributed before school, during snack, lunch, and after school.

2. Coercion is not used to induce students to accept the printed matter or to sign petitions.

3. Funds or donations are not collected or solicited on campus for materials distributed.

4. Leaflets and printed materials to be distributed shall be submitted to the Principal, or his designee, at least 24 hours prior to such distribution. Approval or disapproval of such distribution shall be indicated as soon as reasonably possible, and not later than the same time the next school day. The official may limit the number of students who may distribute materials in any one day.

5. Materials shall not be left undistributed or stacked for pickup at any place in the school or on school grounds without permission of the Principal or his designee.

. . .

Prohibited Materials

In the exercise of student rights descriptions [sic] above, no student shall distribute materials, wear buttons or other displays, nor post notices or other materials which:

1. Are obscene to minors according to current legal definitions.

2. Are libelous or slanderous according to current legal definitions.

3. Incite students so as to create a clear and present danger of the imminent commission of unlawful acts on school premises or the violation of lawful school regulations or the substantial disruption of the orderly operation of the school.

4. Are distributed in violation of the time, place, and manner requirements.

. . .

Rules and Regulations

The designated local school administrator shall develop administrative rules and regulations to implement this policy in conjunction with student government representatives. In case of a disagreement, the decision of the designated administrator shall be final.

Saddleback Valley Unified School District (SVUSD) Board Policy No. 5133.1 provides, in relevant part:

No off-campus or private clubs are permitted to function in the school. They are also restricted from advertising in any form.

The only clubs and organizations which may use school facilities during the school day are those which are school sponsored. The school day includes nonclassroom time.

Saddleback Valley Unified School District (SVUSD) Administrative Regulation 5133.1 provides, in relevant part:

3. *Freedom of Expression*

Nothing in Board Policy 5133.1 nor Administrative Regulation 5133.1 shall be construed to be in opposition to students' rights of freedom or expression as specified in Education Code Section 48916 [sic] or Board Policy 5145.3 and 6144.1.

No. 88-340

(3)

Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

—o—

ALEXANDER PERUMAL, *et al.*,

Plaintiffs and Petitioners,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*,

Defendants and Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

—o—

David C. Larsen*
Patrick K. Rafferty
Rutan & Tucker
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
(714) 641-5100

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

44 pp

QUESTIONS PRESENTED

1. Whether a public high school must permit an off-campus, private religious club composed of students to advertise on campus during the instructional day meetings of a religious nature to be held during the instructional day, despite the school district's policy of excluding operation and advertising by all clubs and organizations which are not school-sponsored and related to the school district's curriculum?

2. Whether the establishment clause of the First Amendment is violated if a school district allows high school students on a high school campus during the compulsory instructional day to proselytize and advertise prayer and Bible study meetings by distributing religious literature?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	11
ARGUMENT	12
I. THE SCHOOL DISTRICT'S DECISION TO LIMIT STUDENT CLUBS AND ORGANIZATIONS WHICH OPERATE AND ADVERTISE DURING THE INSTRUCTIONAL DAY TO THOSE THAT ARE SCHOOL-SPONSORED AND CURRICULUM-RELATED IS CONSISTENT WITH THIS COURT'S FIRST AMENDMENT FORUM ANALYSIS	12
II. THE SCHOOL'S PROHIBITION ON ADVERTISEMENTS BY OFF-CAMPUS AND PRIVATE CLUBS IS NOT OVERBROAD OR VAGUE	20
III. POTENTIAL VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION AND OF THE CALIFORNIA CONSTITUTION PROVIDES A COMPELLING STATE INTEREST WITH RESPECT TO THE ADVERTISEMENTS IN QUESTION IN THIS CASE	22
IV. CONCLUSION	26
APPENDIX A—Relevant Statutory Provisions	App. 1
APPENDIX B—Relevant School Board Policy and Administrative Regulation	App. 6

TABLE OF AUTHORITIES

Page(s)

CASES

Bancroft-Whitney Co. v. McHugh, 166 Cal. 140 (1913) 9

Baughman v. Freienmuth, 478 F. 2d 1345 (4th Cir. 1973) 16

Bell v. Little Axe Independent School District No. 70, 766 F. 2d 1391 (10th Cir. 1985) 24

Bender v. Williamsport Area School District, 563 F. Supp. 697 (M. D. Pa. 1983), *reversed*, 741 F. 2d 538 (3rd Cir. 1984), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986) 24, 25

Bennett v. Livermore Unified School District, 193 Cal.App.3d 1012, 238 Cal.Rptr. 819 (1987) 22

Bethel School District No. 403 v. Fraser, 478 U.S. —, 92 L.Ed. 2d 549, 106 S.Ct. 3159 (1986) 18, 20, 25

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. —, 96 L.Ed. 2d 500, 107 S.Ct. 2568 (1987) 20, 21

Brandon v. Board of Education of Guilderland Central School, 635 F. 2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1123, *reh. denied*, 455 U.S. 983 (1981) 23

Brown v. Orange County Board of Public Instruction, 128 So. 2d 181 (Fla. App. 1960) 25

Bystrom v. Fridley High School Independent District No. 14, 822 F. 2d 747 (8th Cir. 1987) 17

Clark v. Dallas Independent School District, 671 F. Supp. 1119 (N.D. Tex. 1987) 17, 25

Collins v. Chandler United School District, 644 F. 2d 759 (9th Cir.) *cert. denied*, 454 U.S. 863 (1981) 24

Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) 11, 13, 14, 15, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Eisner v. Stamford Board of Education, 440 F. 2d 803 (2nd Cir. 1971) 16

Estate of Teel, 25 Cal.2d 520 (1944) 9

Fujishima v. Board of Education, 460 F. 2d 1355 (7th Cir. 1972) 16

Garnett v. Renton School District No. 403, 675 F. Supp. 1268 (W.D. Wash. 1987) 17, 25

Goodwin v. Cross County School District No. 7, 394 F. Supp. 417 (E.D. Ark. 1973) 25

Hazelwood School District v. Kuhlmeier, 498 U.S. —, 98 L.Ed. 2d 592, 108 S.Ct. 562 (1988) 11, 13, 14, 15, 25

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 19

Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977) 25

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 21

Hunt v. Board of Education, County of Kanawha, 321 F. Supp. 1263 (S.D. W. Va. 1971) 25

Jacobs v. Board of School Commissioners, 490 F. 2d 601 (7th Cir. 1973), *vacated on jurisdictional grounds*, 420 U.S. 128 (1975) 16

Johnson v. Huntington Beach Union High School District, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 887 (1977) 4, 22, 25

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 15

Karp v. Becken, 477 F. 2d 171 (9th Cir. 1973) 16, 17

Katz v. McAulay, 438 F. 2d 1058 (2nd Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) 17, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Kompf v. Morrison, 73 Cal. App. 2d 284 (1946) 9

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 13, 15

Lemon v. Kurtzman, 403 U.S. 602 (1971) 23, 24, 26

Lipkis v. Caveney, 19 Cal. App. 3d 383, 96 Cal. Rptr. 779 (1971) 26

Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) 24

Meltzer v. Board of Public Instruction of Orange County, Florida, 548 F. 2d 559 (5th Cir. 1977) 25

Michael U. v. Jamie B., 39 Cal. 3d 787, 218 Cal. Rptr. 39 (1985) 10

Nartowicz v. Clayton County School District, 736 F. 2d 646 (11th Cir. 1984) 24, 25

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 11, 12, 13, 14

Riseman v. School Committee, City of Quincy, 439 F. 2d 148 (1st Cir. 1971) 17

Robinson v. Sacramento City Unified School District, 245 Cal. App. 2d 278, 53 Cal. Rptr. 781 (1966) 19

San Diego Committee v. Governing Board of Grossmont Union High School District, 790 F. 2d 1471 (9th Cir. 1986) 16

Scoville v. Board of Education, 425 F. 2d 10 (7th Cir.) *cert. denied*, 400 U.S. 826 (1970) 17

Shanley v. Northeast Independent School District, 462 F. 2d 960 (5th Cir. 1972) 16

TABLE OF AUTHORITIES—Continued

Page(s)

State Board of Education v. Board of Education of Netcong, 270 A. 2d 412 (N.J. 1970), *cert. denied*, 401 U.S. 1013 (1971) 25

State ex rel. Greisinger v. Grand Rapids Board of Education, 100 N. E. 2d 294 (Ohio), *cert. denied*, 340 U.S. 820 (1950), *reh. denied*, 341 U.S. 917 (1951) 25

Student Coalition for Peace v. Lower Merion School District Board of Directors, 776 F. 2d 431 (3rd Cir. 1985) 15, 17

Thomas v. Board of Education Granville Central School District, 607 F. 2d 1043 (2nd Cir. 1979) 17

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 14, 16, 17, 21

Tudor v. Board of Education, 14 N.J. 31, 100 A. 2d 857 (1953), *cert. denied, sub. nom., Gideons International v. Tudor*, 348 U.S. 816 (1954) 25

Widmar v. Vincent, 454 U.S. 263 (1981) 22, 25

Ziegler v. Santa Cruz High School District, 168 Cal. App. 2d 277 (1959) 18

CONSTITUTIONS AND STATUTES

U.S. Const. Amend. I 2, 8, 9, 24

20 U.S.C. §§ 4071, *et seq.* 6, 12, 14

28 U.S.C. § 1257(3) 2

California Constitution, Art. I, § 4, Art. XVI, § 5 22

California Code of Civil Procedure § 632 9

California Education Code
§ 40041 ..... 5, 19

TABLE OF AUTHORITIES—Continued

Page(s)

§ 44807 ..... 2, 18

§ 48200 ..... 2, 25

§ 48907 ..... 2, 8, 10, 21

§ 48930 ..... 2, 18

§ 48932 2

California Administrative Code Title 5, § 5552 ..... 2, 18

Saddleback Valley Unified School District Policy Nos.

5133.1 ..... 2, 4, 15

5145.3 ..... 5, 20

6144.1 ..... 5, 20

Saddleback Valley Unified School District Administrative Regulation No. 5133.1 ..... 2, 4, 5, 20

OTHER AUTHORITIES

130 Congressional Record H-7736, H-7739 15

Regulations as to Fraternities and Similar Associations Connected with Educational Institutions, 10 A.L.R. 3d 389 (1966) 19

No. 88-340

In The
Supreme Court of the United States
October Term, 1988

ALEXANDER PERUMAL, *et al.*,
Plaintiffs and Petitioners,

v.

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, *et al.*,
Defendants and Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Respondents respectfully request this Court deny Petitioners' petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth District, Division 3.

OPINIONS BELOW

The judgment of the Court of Apepal was rendered on January 29, 1988, and is reported at 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 (1988). The opinion affirms the judgment of the Superior Court of Orange County, California, Case No. 45-78-95, filed July 1, 1985, an unreported judgment.

———o———

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(3).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant portions of the State of California Education Code §§ 44807, 48907, 48930, 48932, 48200, and Title 5 of the California Administrative Code, § 5552, are set forth in Appendix A attached hereto.

Saddleback Valley Unified School District Board Policy No. 5133.1 and Administrative Regulation 5133.1, only

parts of which are set forth in the Appendix to the Petition, are included in their entirety as Appendix B attached hereto.

———o———

STATEMENT OF THE CASE

The Saddleback Valley Unified School District is a political subdivision of the State of California, organized for the purpose of operating a public school system. The District operates several high schools, including Mission Viejo High School and El Toro High School. During the 1981-82 school year, the District allowed its high schools to sponsor student religious clubs known as "New Life," which were dedicated to Christian Bible study and prayer. In March 1981, as a result of parent complaints and a County Counsel opinion, the District withdrew its official recognition of "New Life" but allowed students to continue to meet in classrooms during the school day and to advertise their meetings as unofficial organizations. (Pet. App. A at 2a, n.1)

In May 1982, the District adopted a new policy with respect to student clubs. The new policy limited the use of school facilities during the school day to those clubs which were school-sponsored. (SCF 165-166, 189)[1] The policy further provided that "No off-campus or private

---

[1] SCF, meaning Superior Court File, refers to the record on appeal in this action in the California appellate system. Pursuant to local rule, and by stipulation of the parties, the record on appeal in California consisted of the original Orange County Superior Court file (Case No. 457895) rather than a Clerk's transcript. All subsequent SCF references are to this source.

clubs are permitted to function in the School. They are also restricted from advertising in any form." Saddleback Valley Unified School District Board Policy 5133.1. (Reply App. B at 7) Student-sponsored clubs share certain criteria. The clubs must be approved by the associated student governing body and the principal of the school, membership is limited to students attending the school, and membership must be open to all students who meet the qualifications and standards of membership set forth in the club charter. Each organization is required to be sponsored by a faculty member who will attend all meetings. School-sponsored clubs are permitted to use the official name of the school, use school buildings and other facilities, publicize activities on daily bulletin boards and in school publications, wear identifying symbols and sell on school premises tickets to special activities sponsored by the organization. (Reply App. B at 6)

Administrative Regulation 5133.1 requires that school clubs have a curriculum-related purpose and conduct activities in compliance with Board policies. The regulation makes the principal responsible for insuring that no off-campus, private or non-sponsored clubs or organizations function on the campus *during the school day,* including break times, lunch period or other non-classroom time.[2] (Reply App. B at 8) (Emphasis added.) Pursuant to Board policies, all clubs and student organizations are part of the District's educational program. (SCF 182, 184) The regulation further provides that off-campus, private or

---

[2] The lunch period is considered an inseparable part of the school day. *Johnson v. Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 13 n.11, 14 n.12, 137 Cal. Rptr. 43, *cert. denied,* 434 U.S. 887 (1977).

non-sponsored clubs or organizations may apply through appropriate channels to use school facilities outside of the school day.[3] (Reply App. B at 8)

In the fall of 1982, students associated with the New Life Club inquired of the principals of El Toro and Mission Viejo High Schools whether they could formally meet for the purposes of discussing their particular religious viewpoints and for prayer. The students were advised they could not formally meet as a club or off-campus organization, but they were free to eat lunch together and discuss whatever they desired. (SCF 143, 150; Pet. App. A at 2a, n.1) The right to such individual and personal expression is recognized by Board Policies 5145.3 and 6144.1 (Pet. App. F at 51a-53a), which is incorporated by reference into the District's Administrative Regulation 5133.1 on student organizations. (Reply App. B at 9) District administrators, from time to time as part of the normal monitoring of campus activities, observed groups of students reading and discussing the Bible during their lunch break. However, there was no effort by these students to formalize their organization by appointing or electing officers or by advertising their meetings. (SCF 143, 150)

In the beginning of the 1984-85 school year, the student petitioners in this case attempted to re-establish formal New Life Clubs at their respective campuses pur-

---

[3] Public schools outside of the instructional day are civic centers available to students for non-school but related purposes. California Education Code § 40041. Students may use these facilities subject to various regulations relating to availability and non-interference with the general school process. Petitioners in this case have been repeatedly informed of their rights pursuant to these provisions and their ability to apply for such usage. (SCF 177)

suant to the Federal Equal Access Act of 1984. (20 U.S.C. §§ 4071, *et seq.*) Acting as Presidents of the New Life Clubs at their respective high schools, Petitioners Read and Perumal, with the support of a citizens' Christian evangelical group, appeared at various School Board meetings requesting they be allowed to operate on campus like other student clubs. (Pet. App. A at 2a, n.1) These requests included demands for the right to use a classroom for meetings and to advertise club meetings through the media of the school bulletin, advertising flyers passed out to other students and posters placed in the school hallways. (SCF 181) The request was based on an assertion that the District allowed other non-curriculum related clubs to meet. In response, the District surveyed existing clubs and concluded all clubs were school-sponsored and, in effect, curriculum-related.[4] The District specifically informed Petitioners that in fact the District did not have a limited open forum. (SCF 182)

Petitioners then requested the Board of Trustees to consider modification of its existing policy by establishing a limited open forum in order that Petitioners might formally meet and advertise their Bible study and prayer meetings. A public meeting was held on the matter and after extensive public debate, including statements from both Petitioners and their parents, individual Board members expressed their opinions that the existing policy and practice should not be changed or modified. (SCF 185)

Notwithstanding the Board's decision, Petitioners attempted to circumvent the policy and reinstate non-school

---

[4] This finding by the District was not challenged in these proceedings.

sponsored high school clubs by advertising on campus New Life Club or group activities, including Bible study and prayer meetings to be held during the school day. In a letter to the principal on February 7, 1985, Petitioner Perumal, as President of the El Toro New Life Club, requested the right to distribute a flyer which advertised, "New Life at ETHS." (SCF 144, 147) The flyer indicated New Life meetings occurred on-campus every Tuesday and Thursday during the lunch period of the school day, and stated the Club's purposes were Bible study, "meeting with other Christians at school," and "praying for the needs of others while they pray for your needs." Petitioner Perumal's request was denied in light of the District's policy concerning private or off-campus organizations. (SCF 144)

In March 1985, Petitioner Read, as President of "New Life, Mission Viejo High School," made a similar request for permission to distribute a flyer advertising Bible study, "learning about Jesus Christ," "helping others through prayer," and "having Christian friends." This request was also denied by the principal after a meeting with Petitioner wherein the District policy was explained. (SCF 151) Both the Perumal and Read decisions were based upon the conclusion that neither organization had any relationship to the school's curriculum.

Petitioner Read later attempted to submit an advertisement to the school yearbook. The advertisement would have publicized New Life meetings to be held on campus during the school day, and, quoting from the New Testament, proclaimed the religious nature and purpose of the Club. (SCF 157) The advertisement was rejected on the basis of the District's policy. (SCF 152)

Finally, on March 26, 1985, both Petitioners attended a meeting with the District Superintendent and the principal at Mission Viejo High School. During this meeting, Petitioners renewed their request to distribute flyers advertising their meetings, and requested the entire issue be placed on the School Board meeting agenda. Petitioners acknowledged that the purpose of the request was to better proselytize for membership. (SCF 187) Petitioners were informed they previously had been given the opportunity to fully address the School Board with their request to have the campus opened up to non-school sponsored, non-curriculum related clubs, and entitle them to meet and advertise their meetings. Petitioners were reminded that their request, after extensive public debate, had been rejected, and it was felt there was no point in revisiting the matter. (SCF 176-177)

Thereafter, Perumal and Read commenced an action in the California Superior Court seeking a writ of mandate and challenging the District's regulations and actions on the basis of California Education Code Section 48907 and the First Amendment's guarantee of the right to free speech. Petitioners requested the Court mandate they be permitted to publish their advertisement in the Mission Viejo High School yearbook, and they and their fellow students be allowed to distribute flyers advertising their meetings in accordance with California Education Code Section 48907.[5] The District defended first on the basis

---

[5] While the suit also requested damages according to proof, no evidence was submitted to the court of any damages. Under a fundamental doctrine of appellate review, all legitimate and

(Continued on following page)

that its policy was a valid regulation governing operation of student organizations and clubs and that the policy precluded non-school sponsored clubs and organizations from meeting or advertising during the instructional day. Secondly, the District maintained that to allow the distribution of religious flyers and materials on a public school campus during the instructional day would violate the establishment clause of the First Amendment of the United States Constitution and various provisions of the California state constitution.

The matter was submitted to the Superior Court on the basis of the petition, the return, the demurrer thereto, and evidence submitted by Respondents by way of declaration.[6] The petition was denied (SCF 444), and Petitioners did not request a statement of decision.[7]

(Continued from previous page)

reasonable inferences must be indulged in to uphold the verdict of the trial court. When a verdict is attacked, the power of the reviewing court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding below; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 142 (1913); *Estate of Teel*, 25 Cal. 2d 520, 527 (1944); unless the record affirmatively demonstrates error, the reviewing court will adopt the holding below. *Kompf v. Morrison*, 73 Cal. App 2d 284, 286-287 (1946). In this case, Petitioners failed to present *any* evidence of damages at the trial court level and thus, on appeal, cannot raise the issue of damages.

[6] Petitioners had originally requested an evidentiary hearing. (SCF 388) However, at the time scheduled for the matter, Petitioners agreed to go forward on the basis of the written record before the trial court.

[7] Under California Code of Civil Procedure Section 632, any party appearing at trial may request a statement of decision

(Continued on following page)

The California Court of Appeal affirmed by a divided vote of 2 to 1. In so doing, the court rejected Petitioners' main argument that the District's action violated California Education Code Section 48907, which provides a broad spectrum of free speech rights to students. The court concluded the statute allows school districts to promulgate their own "lawful regulations" and provides student rights may be restricted if the expression violates those lawful regulations. (Pet. App. A at 4a-5a) The court recognized that the policy prohibiting off-campus or non-school sponsored clubs from functioning or advertising on campus was a valid rule under Education Code Section 48907. The court also recognized the District's right to elect to maintain a closed forum as opposed to a limited open forum. (Pet. App. A at 7a and 9a) Moreover, the court rejected Petitioners' argument that New Life was not in fact an off-campus or private club. Instead, the court found the structure surrounding the group's meetings, including its leadership hierarchy, advertising, instruction, and meeting schedule, were all indicative of an off-campus or private club, thereby bringing the organization within the ambit of the rule. (Pet. App. A at 6a-7a) The court further concluded that a religious club operating in the closed forum adopted by the District would vio-

---

(Continued from previous page)

explaining the legal and factual basis for the court's decision on each principal controverted issue. The request must be made within 10 days after the court announces a tentative decision. Failure to request a statement of decision results in an assumption by the reviewing court that the trial court made findings necessary to sustain the judgment. *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 793, 218 Cal. Rptr. 39 (1985). And as discussed in footnote 5, *supra*, a reviewing court will indulge in every reasonable inference to sustain a judgment below.

late both state and federal constitutional proscriptions against the establishment of religion. (Pet. App. A at 9a-13a)

Petitioners sought discretionary review by the California Supreme Court, which was denied on April 27, 1988. This Petition for Certiorari followed.

———o———

SUMMARY OF ARGUMENT

Contrary to Petitioners' assertion, this case does not involve individual expression or questions of censorship on the basis of subject matter. Rather, the issue is whether a public school district devoted to primary and secondary education has the right to limit the use of its facilities during the compulsory attendance day to student organizations and clubs which are related to the school district's educational program. Respondents' activity in this case is limited to enforcing a policy, which applies only to off-campus or private clubs that attempt to function and advertise in a school, during the time set aside for the curriculum and matters attendant thereto. Excluding off-campus clubs and organizations from operations during the compulsory attendance day, as was done in this case, is entirely consistent with this Court's recent determinations in *Hazelwood School District v. Kuhlmeier,* 498 U.S. —, 98 L.Ed. 2d 592, 108 S.Ct. 562 (1988); *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. 788 (1985); and *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37 (1983). Furthermore, the School District's decision is a legislatively

recognized option under the Equal Access Act. 20 U.S.C. §§ 4071, *et seq.* In addition, the California Court of Appeal correctly found that under the circumstances of this case, the distribution of religious literature and advertisements on a high school campus would violate the California and United States Constitutions. Under the facts of this case, the state court of appeal's decision was correct and consistent with well-established precedent, and should not be reviewed.

ARGUMENT

I. THE SCHOOL DISTRICT'S DECISION TO LIMIT STUDENT CLUBS AND ORGANIZATIONS WHICH OPERATE AND ADVERTISE DURING THE INSTRUCTIONAL DAY TO THOSE THAT ARE SCHOOL-SPONSORED AND CURRICULUM-RELATED IS CONSISTENT WITH THIS COURT'S FIRST AMENDMENT FORUM ANALYSIS.

In *Perry Education Association v. Perry Local Educators' Association, supra,* 460 U.S. 37, this Court recognized three types of forums: the open forum, those places which from time immemorial have been open for public debate and discussion such as streets and parks; the limited forum, public property the state has opened for use by the public as a place for expressive activity; and the non-public forum, public property which is not by tradition or designation a forum for public communication. With respect to the first two forums, reasonable time, place and manner regulations are permissible but content-based restrictions must be narrowly drawn to effectuate a com-

pelling state interest. 460 U.S. at 45-46. However, this Court has held the state may reserve the non-public forum for "its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's viewpoint." 460 U.S. at 46.

In discussing its forum analysis, this Court in *Cornelius v. NAACP Legal Defense and Educational Fund, supra*, 473 U.S. 788, noted there must be "clear evidence" of an intent by the state to create a public forum. With respect to control of access to a non-public forum, the Court recognized a public agency could exclude a speaker addressing a topic not encompassed within the purpose of the forum. 473 U.S. at 806. (See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). Additionally, a speaker who was not a member of the class of speakers for whose special benefit the forum was created could be excluded from the forum. *Cornelius, supra*, 473 U.S. at 806. (See also *Perry Education Association, supra.*)

In *Hazelwood School District v. Kuhlmeier*, 498 U.S. —, 108 S.Ct. 562, *supra*, this Court specifically noted public schools do not possess all of the attributes of streets, parks and other traditional public forums. 108 S.Ct. at 567. Further, the Court decided school facilities may be deemed public fora only if school authorities have, by policy or by practice, opened those facilities for indiscriminate use by the general public or by some segment of the public such as student organizations. 108 S.Ct. at 568. The Court recognized if instead of opening the forum, school facilities have been reserved for other intended purposes, communicative or otherwise, then no public forum has been created. In such case, school offi-

cials may impose reasonable restrictions on the speech of students, teachers and other members of the school community. In *Hazelwood,* the Court concluded the school-sponsored newspaper was not a limited forum for student expression since school officials had clearly retained control of the student newspaper for educational reasons. 108 S.Ct. at 568-569. Additionally, the Court noted that school district inaction, by not silencing students' personal expression, which happened to occur on school premises did not, in and of itself, create a public forum. 108 S.Ct. at 569. The Court recognized certain activities, such as those the public might reasonably perceive to bear the imprimatur of the school, may be fairly characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to students and audiences. 108 S.Ct. at 569-570. The Court concluded that the student expression standard previously recognized in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), did not establish a standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. 108 S.Ct. at 570-571.

Consistent with this Court's opinions in *Perry, Cornelius* and *Hazelwood,* the Saddleback Valley Unified School District has determined *not* to take affirmative action to establish an open forum for student organizations or clubs.[8] Rather, the District has determined that

---

[8] This determination is also consistent with the recently enacted Federal Equal Access Act (20 U.S.C. §§ 4071, et seq.),

(Continued on following page)

during the instructional day, the only clubs and organizations permitted to operate on campus are those which are curriculum-related or related to the educational program of the District. Such is the essence of District Policy 5133.1 and the practice surrounding that policy.[9] This District policy, which excludes *all* off-campus and private clubs and organizations from operating and advertising[10] during the instructional day, is quite clearly viewpoint

---

(Continued from previous page)

which requires a school district provide equal access in the event a limited open forum is created. The Act presupposes a choice on the part of the school district between a limited open forum and a closed forum. See *Student Coalition for Peace v. Lower Merion School District Board of School Directors*, 776 F. 2d 431, 442 (3rd Cir. 1985). Such a choice is not only inherent within the terms of the Act itself, but is clearly consistent with the legislative history behind the Act. 130 Congressional Record, H-7739 (Daily Ed. July 25, 1984) (Statement of Rep. Synar); *Id.* at H-7736 (Statement of Rep. Bonker); *Id.* (Statement of Rep. Pepper).

[9] The yearbook advertisement is not in fact unique as suggested by Petitioners. Just as the newspaper in *Hazelwood*, the yearbook is a school-sponsored document. While commercial advertisements have been accepted to defray operating expenses (amounting to less than 5% of the budget) (SCF 152), it is clear that off-campus and private club advertising in the yearbook is specifically excluded by District Policy 5133.1. As such, private club advertisements represent a topic not encompassed within the purpose of the forum. This determination is analogous to the ban on political advertisements addressed by this court in *Lehman v. City of Shaker Heights, supra*, 418 U.S. 298 (1974). See *Cornelius v. NAACP Legal Defense and Educational Fund, supra*, 473 U.S. 788, 806.

[10] The Petition also fails to recognize the difference between informal discussions, which the District has never sought to restrict, and solicitations to join in formal meetings. As recognized by this Court, however, "solicitation of membership itself involves a good deal more than the simple expression of individual views." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 131 (1977).

neutral[11] and is reasonably related to the purpose of the forum.

---

[11] In this respect, the present case is completely dissimilar to *Tinker, supra,* wherein the rule at issue found by this Court to be unconstitutional was expressly viewpoint-based. In *Tinker,* the Court emphasized the fact that school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance, but only banned a specific symbol exhibiting opposition to the nation's involvement in the Vietnam war. The *Tinker* Court very clearly recognized the regulation in question prohibited expression of one particular opinion. 393 U.S. at 510-511. A similar distinction can be made with respect to another case relied upon in the petition, *San Diego Committee v. Governing Board of Grossmont Union High School District,* 790 F. 2d 1471 (9th Cir. 1986). In *San Diego,* once again there was a clear restriction based upon the speaker's viewpoint since the newspaper in question had accepted advertisements supporting the draft, which the court recognized as political speech, while rejecting an advertisement in opposition thereto.

Likewise, the reliance of the petitioners on the "underground newspaper" cases is not well-taken. (Pet. at 18, n.13) Those cases, which by and large apply the *Tinker* analysis, involve primarily overbroad or vague policies, which effectively prohibited all types of individual student expression. See *Jacobs v. Board of School Commissioners,* 490 F. 2d 601 (7th Cir. 1973), *vacated on jurisdictional grounds,* 420 U.S. 128 (1975) (underground student newspaper involving individual expression); *Baughman v. Freienmuth,* 478 F. 2d 1345, 1347-1348 (4th Cir. 1973) (individual expression attacking school regulation prohibiting a form of pamphleteering); *Karp v. Becken,* 477 F. 2d 171, 174-175 (9th Cir. 1973) (school district had the right to discipline student for disruption caused by carrying a placard); *Fujishima v. Board of Education,* 460 F. 2d 1355, 1356 (7th Cir. 1972) (individual expression by two students by means of an underground newspaper); *Shanley v. Northeast Independent School District,* 462 F. 2d 960, 964 (5th Cir. 1972) (individual expression involving an underground newspaper distributed off-campus); *Eisner v. Stamford Board of Education,* 440 F. 2d 803, 805, 808 (2nd Cir. 1971) (recognition of school authorities' right to preclude or restrict distribution of off-campus student newspapers on school property, but finding policy vague with respect

(Continued on following page)

The exclusion of off-campus and private clubs and organizations from functioning and advertising on a school campus during the instructional day serves legitimate and important purposes directly related to the educational function of the school. First, since the school has a limited amount of resources and facilities available during the instructional hours for student organizations, the District has determined those resources should be limited to

---

(Continued from previous page)

to definition of distribution); *Riseman v. School Committee, City of Quincy*, 439 F. 2d 148, 149 (1st Cir. 1971) (school authority rule designed for the purpose of controlling in-school advertising or promotional efforts of organizations held to be vague and improperly used to control distribution of an anti-war leaflet); *Scoville v. Board of Education*, 425 F. 2d 10, 11 (7th Cir.) *cert. denied*, 400 U.S. 826 (1970) (individual expression criticizing school policies and authorities); *Thomas v. Board of Education Granville Central School District*, 607 F. 2d 1043, 1045, 1050 (2nd Cir. 1979) (off-campus distribution of individually-produced newspaper); *Bystrom v. Fridley High School Independent School District No. 14*, 822 F. 2d 747, 749-750 (8th Cir. 1987) (school district may prohibit the distribution on school property of an underground newspaper).

Rather, this case is consistent with other cases holding that a public school is not necessarily a public forum for the purpose of non-school related gatherings and activities. *Student Coalition for Peace v. Lower Merion School District Board of Directors*, 776 F. 2d 431, 435 (3rd Cir. 1985); *Garnett v. Renton School District No. 403*, 675 F. Supp. 1268 (W. D. Wash. 1987); *Cf. Katz v. McAulay*, 438 F. 2d 1058 (2nd Cir. 1971) *cert. denied*, 405 U.S. 933 (1972); *Karp v. Becken, supra; Clark v. Dallas Independent School District*, 671 F. Supp. 1119, 1122 (N. D. Tex. 1987).

Finally, in *Tinker*, the Court also recognized that expression cannot intrude upon the work of the school. *Tinker, supra*, 393 U.S. at 508. In this respect, the meeting and advertisement of off-campus and private clubs in fact does intrude upon the District's ability to effectively sponsor and utilize limited attendance day non-classroom time for classroom-related purposes. See discussion at pp. 17-19, *infra*.

student groups and organizations which directly relate to the school's established curriculum. In this respect, the District has required that faculty members be involved in the operation of school-sponsored clubs. Second, the District wishes to avoid diluting the potential educational enrichment provided by school-sponsored organizations such as could result if curriculum-related organizations were placed in competition with private clubs for student attention and interest.[12] Third, the need to monitor and control student organizations and clubs operating within the school framework or setting has long been a matter of public concern and policy.[13] In this respect, the California legislature has expressly authorized public school boards to charter student organizations and control their activities. California Education Code Sections 48930, *et seq.* Moreover, a majority of states have legislation prohibiting elitist social clubs and organizations from operating on school campuses. These regulations recognize the potentially detrimental impact and effect such organiza-

---

[12] See *Katz v. McAulay, supra,* 438 F. 2d at 1061, wherein the court noted: "Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary school pupils as a captive audience to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer the school system. Whether it is done a few minutes before school opens or a few minutes after, its effect is not so limited in time and it is plainly harmful to the operation of the public schools."

[13] The School District has a statutory duty to provide supervision. Calif. Education Code Section 44807; 5 Cal. Admin. Code Section 5552; see, *Ziegler v. Santa Cruz High School District,* 168 Cal. App. 2d 277, 284 (1959). See also *Bethel School District No. 403 v. Fraser,* 478 U.S. —, —, 92 L.Ed. 2d 549, 559, 106 S.Ct. 3159 (1986).

tions can have upon school purposes. See *Robinson v. Sacramento City Unified School District*, 245 Cal. App. 2d 278, 289, 53 Cal.Rptr. 781 (1966) for a review of the states with similar legislation and cases dealing with such restrictions; see also, Annot. Regulations as to Fraternities and Similar Associations Connected with Educational Institutions, 10 A.L.R. 3d 389 (1966).

In sum, Saddleback Valley Unified School District has chosen to devote the six hours of the compulsory attendance school day to educational courses and curriculum-related activities. Students who wish to join organizations or engage in other types of activities outside of the curriculum have the remaining 18 hours of each day available to them. Furthermore, students joining such organizations have access to school facilities under the Civic Center Usage Act.[14] California Education Code § 40041. In this case, the California appellate court found

---

[14] While the District does not believe it must justify its regulation on a time, place or manner basis, the District does believe that such justification could be found. Since off-campus and private clubs and organizations are free to use the school facilities in accordance with the limited forum created by the California Civic Center Act (i.e., outside of the instructional day), use restrictions during the compulsory attendance day are reasonable time, place and manner restrictions.

The compulsory attendance day, which is reserved for classroom instruction and student organizations related to the curriculum, is not the appropriate time for off-campus private clubs to function. By delegating those activities to a time after the compulsory attendance day, the District regulation could be considered an appropriate time restriction. Students could meet on campus shortly after the attendance day has concluded and, in that respect, gain whatever benefits they desire. See Reply App. B and discussion, *supra* at pp. 17-18. *Cf. Cornelius, supra; Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

not only a clear intent by the School District to maintain a closed forum but also that Petitioners, as a matter of fact, were attempting to advertise and operate as an off-campus or private club in violation of the policy.

II. THE SCHOOL'S PROHIBITION ON ADVERTISEMENTS BY OFF-CAMPUS AND PRIVATE CLUBS IS NOT OVERBROAD OR VAGUE.

The School District's policy is not overbroad. As this Court recognized in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. —, —, 96 L.Ed. 2d 500, 507, 107 S.Ct. 2568 (1987), a statute is invalid on its face only if the overbreadth is "substantial." Moreover, unlike the Airport Board resolution found invalid in *Jews for Jesus*, the District's policy and rule does not create a First Amendment free zone or area. The only expression prohibited by the policy is a specific category of speech which, as noted above, is inconsistent with the purpose and intent of the forum. The policy only prohibits advertisement of off-campus or non-school sponsored clubs or organizations operating "in the school."[15] As such, it only applies to a narrow class of expression and only during the instructional day. Other types of student expression are not impacted.[16]

---

[15] The rule in question is much more narrowly drawn than the regulations upheld by this court in *Bethel v. Fraser, supra*, 478 U.S. at —, 92 L.Ed. 2d at 555.

[16] District Administrative Regulation 5133.1 refers to Board policies 5145.3 and 6144.1, which specifically allow students to wear buttons, badges and other insignia, and allow students the right to free expression. Clearly, the intent behind the regulation

(Continued on following page)

In the case at hand, the restriction as applied and interpreted by the California court was limited to off-campus or private clubs, which maintain a leadership structure for the purpose of pursuing the club's goals, recruit new members and advertise regular meetings scheduled on an ongoing basis at specific times and locations.[17] Clearly, the rule does not apply to individual or spontaneous discussions. In effect, the regulation prohibits off-campus groups and organizations from exploiting the public school system with its compulsory attendance day. By their own actions, Petitioners' New Life organizations ceased being merely on-campus informal, private discussion groups and became structured organizations, which sought to expand by advertising. Therefore, New Life became clearly recognizable off-campus or private clubs within the purview of the District policy.[18]

(as recognized by the appellate court) was to follow both this Court's mandate in *Tinker* and the statutory mandate of California Education Code § 48907. See *Board of Airport Commissioners v. Jews for Jesus, supra,* 482 U.S. at —, 96 L.Ed. 2d at 508.

[17] This finding was consistent with the declarations of the principals who are responsible for enforcement of the policy. (Reply App. B at 7-8) (SCF 144, 152-153).

[18] To the extent Petitioners allege that the policy is vague and therefore invalid, they ignore this Court's direction in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982). In *Hoffman Estates,* the court held: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine complainant's conduct before analyzing other hypothetical applications of the law." 455 U.S. at 495. Moreover, there has been no showing that historical application has in any way precluded groups or individuals from engaging in *any* of the non-covered conduct outlined in the Petition at pages 12-13.

III. POTENTIAL VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION AND OF THE CALIFORNIA CONSTITUTION PROVIDES A COMPELLING STATE INTEREST WITH RESPECT TO THE ADVERTISEMENTS IN QUESTION IN THIS CASE.

There is no question that the advertisements in question in this case are part of a plan to proselyte youth attending a public high school for religious purposes.[19] By advertising, Petitioners and their outside sponsoring organization (Pet. App. A at 2a, n.1) were seeking to take advantage of the state's compulsory school attendance laws. In light of the circumstanes of this case, the School District's policy served a compelling state interest by complying with the District's constitutional obligation not to violate the establishment clause of the United States Constitution or the state constitutional mandate that schools not be used for religious purposes.[20] Cf. *Widmar v. Vin-*

---

[19] In their March 26, 1985 request to the District Superintendent, Petitioners wrote: "As representatives of student Bible studies currently taking place on campus, we are asking for a medium to make other students aware of our meetings. Our research indicates that a significant number of students do not know that we exist." (SCF 187)

[20] Article I, Section 4, and Article XVI, Section 5, of the California State Constitution prohibit any state establishment of religion. In *Bennett v. Livermore Unified School District*, 193 Cal. App. 3d 1012, 1016-1017, 238 Cal. Rptr. 819 (1987), the court held the California constitutional provisions in the area of religious involvement in the schools to be more comprehensive and restrictive than those of the federal Constitution. As the court noted therein: "It bans any official involvement, whatever its form, which has the direct, immediate and substantial effect of promoting religious purposes." See also *Johnson v.*

(Continued on following page)

cent, 454 U.S. 263, 271 (1981), wherein this Court noted that a public agency's interest in complying with its constitutional obligations may be characterized as compelling.

The impact of student religious activity on a public high school campus has been reviewed and discussed by the United States Court of Appeals for the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits. In examining religious activity on the high school campus, courts have applied this Court's tripartite test for establishment clause violations as announced in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). The various Circuit Courts of Appeals have recognized that in light of compulsory attendance laws and the impressionable nature of students of high school age, religious activity on a public school campus during the compulsory attendance day is incompatible with the basic and fundamental purpose of public education, and in effect violates the second and oftentimes the third prong of the *Lemon* test.[21] Moreover, the impressionable nature of

---

(Continued from previous page)

Huntington Beach Union High School District, supra, 68 Cal. App. 3d 1, 15-16, wherein the court noted the California Constitution prohibited school officials from permitting a Bible study class to meet and conduct its activities on the school campus during the school day.

[21] In *Brandon v. Board of Education of Guilderland Central School,* 635 F. 2d 971 (2nd Cir. 1980), *cert. denied,* 454 U.S. 1123, *reh. denied* 455 U.S. 983 (1981), the Second Circuit concluded voluntary student-initiated prayer meetings, which occurred during school hours, created the appearance of official support to impressionable students and thereby advanced religion. 635 F. 2d at 978-979. The Court further noted that the supervision required by state law during school hours also in-

(Continued on following page)

(Continued from previous page)

volved impermissible entanglement of state and religion in violation of *Lemon*. 635 F. 2d at 979. In *Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M. D. Pa. 1983), *reversed*, 741 F. 2d 538 (3rd Cir. 1984), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986), the Third Circuit recognized that the presence of a non-school sponsored religious group within the school during the curriculum day had the effect of advancing religion in light of the perceptions of impressionable students. This was true even though the students had agreed, in an effort to mitigate the potential effect, not to use bulletin boards, newspapers or the public address system to promote their meetings. 741 F. 2d at 542. The court likewise found excessive religious-secular entanglement was present as a result of the school district's responsibility to maintain safety, order and a secular schedule, and the potential need to settle controversies and disputes between students on religions issues. 741 F. 2d at 556-557. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F. 2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983), the Fifth Circuit also recognized the potential harmful effect upon impressionable students caused by the district permitting religious meetings to occur immediately before and after school. 669 F. 2d at 1045. The court noted a critical factor in its decision was the existence of the compulsory education day, which made students available to attend voluntary religious meetings. 669 F. 2d at 1046. In *Collins v. Chandler United School District*, 644 F. 2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981), the Ninth Circuit recognized religious activities "in the institutionally coercive setting of primary and secondary schools" are sufficient to justify a conclusion that the district's action had the impermissible effect of advancing religion in violation of the First Amendment establishment clause, and further, that a hands-off attitude by the school district was unacceptable. 644 F. 2d at 762. In *Bell v. Little Axe Independent School District No. 70*, 766 F. 2d 1391 (10th Cir. 1985), the Tenth Circuit recognized that, as a result of both the impressionable nature of students and their inability to avoid contact with religious participants because of the compulsory education laws, the impermissible effect of advancing religion existed. The court also found excessive entanglement of state and religion was present. Finally, in *Nartowicz v. Clayton County School District*, 736 F. 2d 646 (11th Cir. 1984), the Eleventh Circuit recognized establishment clause violations were present when a school district permitted religious groups to disseminate "secular" messages at a school during the school day. The court cited the

(Continued on following page)

secondary school students and the captive audience effect created by compulsory attendance laws, such as California Education Code Section 48200, have recently been recognized by this Court in *Fraser, supra,* 478 U.S. at —, 92 L.Ed. 2d at 558. See also, *Hazelwood, supra,* 498 U.S. at —, 108 S.Ct. at 567; Cf. *Widmar v. Vincent,* 454 U.S. at 274, n.14.

In essence, this case does not involve students who simply wish to meet and discuss their own personal points of view. Rather, this case involves students who, with out-

---

(Continued from previous page)

impressionable nature of students, who might not discern subtleties involved in "secular" announcements made by religious persons using school facilities. The holding noted the fact that the parties had agreed that announcement of religious activities would be impermissible. 736 F. 2d 649 and 649, n.3. See also, *Hernandez v. Hanson,* 430 F. Supp. 1154, 1162 (D. Neb. 1977); *Hunt v. Board of Education County of Kanawha,* 321 F. Supp. 1263 (S.D. W. Va. 1971); *Garnett v. Renton School District No. 403,* 675 F. Supp. 1268 (W. D. Wash. 1987); *Clark v. Dallas Independent School District,* 671 F. Supp. 1119 (N. D. Tex. 1987); *State ex rel. Greisinger v. Grand Rapids Board of Education,* 100 N. E. 2d 294 (Ohio), *cert. denied,* 340 U.S. 820 (1950), *reh. denied,* 341 U.S. 917 (1951); *State Board of Education v. Board of Education of Netcong,* 270 A. 2d 412 (N.J. 1970), *cert. denied,* 401 U.S. 1013 (1971); *Johnson v. Huntington Beach Union High School District, supra,* 68 Cal. App. 3d 1; but see *Bender v. Williamsport Area School District,* 563 F. Supp. 697 (M. D. Pa. 1983), *reversed* 741 F. 2d 538 (3rd Cir. 1984), *vacated on jurisdictional grounds,* 475 U.S. 534 (1986).

An additional establishment clause problem is created by the religious content of the advertisements. Two of the advertisements set forth the Biblical text found at II Corinthians 5:17, and the third contained the statement, "Christ is born. God kept his promise." Many courts have found the distribution of religious literature on a public school campus to be inappropriate. *Meltzer v. Board of Public Instruction of Orange County, Florida,* 548 F. 2d 559 (5th Cir. 1977); *Goodwin v. Cross County School District No. 7,* 394 F. Supp. 417 (E. D. Ark. 1973); *Brown v. Orange County Board of Public Instruction,* 128 So. 2d 181 (Fla. App. 1960); *Tudor v. Board of Education,* 14 N. J. 31, 100 A. 2d 857 (1953), *cert. denied, sub. nom., Gideons International v. Tudor,* 348 U.S. 816 (1954).

side assistance, have undertaken an organizational effort during the compulsory attendance day to build a student organization committed to religious study, and which would hold organized meetings during the compulsory attendance day. Such a purpose and direction is totally inconsistent with the defined purpose of the state-supported public school system for children.[22] Moreover, if the School District allowed this activity, the effect and entanglement problems recognized by the federal courts in the above-referenced establishment clause cases and by this Court in *Lemon*, clearly would become relevant.

IV. CONCLUSION

For all the foregoing reasons, Respondent submits that Petitioners have failed to establish any sound basis for this Court to review the holding below. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

David C. Larsen*
Patrick K. Rafferty
Rutan & Tucker
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
(714) 641-5100
Attorneys for Defendants and Respondents

*Counsel of Record

DATED: September 28, 1988

---

[22] As noted by one California court: "The purpose of . . . High School, as of any school, is to educate and not . . . to provide appellant with a 'captive audience for speech making,' to wit: an audience composed of students who are having lunch at or about the quad." *Lipkis v. Caveney*, 19 Cal. App. 3d 383, 387, 96 Cal. Rptr. 779 (1971).

APPENDIX A

RELEVANT STATUTORY PROVISIONS

State of California Education Code Section 44807 provides:

§ 44807. Duty concerning conduct of pupils

Every teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds or during recess. A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The provisions of this section are in addition to and do not supersede the provisions of Section 49000.

State of California Education Code Section 48200 provides:

§ 48200. Children between ages 6 and 18 years

Each person between the ages of 6 and 18 years not exempted under the provisions of this chapter or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education

not exempted under the provisions of Chapter 3 (commencing with Section 48400) shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residency of either the parent or legal guardian is located and each parent, guardian, or other person having control or charge of the pupil shall send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday by the governing board of the school district in which the residence of either the parent or legal guardian is located.

Unless otherwise provided for in this code, a pupil shall not be enrolled for less than the minimum schoolday established by law.

State of California Education Code Section 48907 provides:

§ 48907. Student exercise of free expression

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commis-

sion of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

Each governing board of a school district and each county board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction.

Student editors of official school publications shall be responsible for assigning and editing the news, editorial, and feature content of their publications subject to the limitations of this section. However, it shall be the responsibility of a journalism adviser or advisers of student publications within each school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to maintain the provisions of this section.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

"Official school publications" refers to material produced by students in the journalism, newspaper, yearbook, or writing classes and distributed to the student body either free or for a fee.

Nothing in this section shall prohibit or prevent any governing board of a school district from adopting otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

State of California Education Code Section 48930 provides:

§ 48930. Purpose and privileges of student body organization

Any group of students may organize a student body association within the public schools with the approval and subject to the control and regulation of the governing board of the school district. Any such organization shall have as its purpose the conduct of activities on behalf of the students approved by the school authorities and not in conflict with the authority and responsibility of the public school officials. Any student body organization may be granted the use of school premises and properties without charge subject to such regulations as may be established by the governing board of the school district.

State of California Education Code Section 48932 provides:

§ 48932. Authorization for activities by student organizations; fund-raising

The governing board of any school district may authorize any organization composed entirely of pupils attending the schools of the district to maintain such activities, including fund-raising activities, as may be approved by the governing board.

The governing board of any school district may, by resolution, authorize any student body organization to conduct fund-raising activities on school property during school hours provided that the governing board has determined that such activities will not interfere with the normal conduct of the schools.

California Administrative Code, Title 5, Section 5552 provides:

5552. Playground Supervision.

Where playground supervision is not otherwise provided, the principal of each school shall provide for the supervision by certificated employees of the conduct and safety, and for the direction of play, of the pupils of the school who are on the school grounds during recess and other intermissions and before and after school.

APPENDIX B

RELEVANT SCHOOL BOARD POLICY AND ADMINISTRATIVE REGULATION

Saddleback Valley Unified School District Board Policy No. 5133.1 provides:

a. *Clubs: School Sponsored* *5133.1*

Clubs recognized by the Board of Education are those which are sponsored by the individual schools of the district. Clubs shall be responsible to the school through which they are organized.

The club's charter must be approved by the Associated Students' governing body and by the principal of the school. Membership must be limited to the students attending the school, and must be open to all students who meet the qualifications and standards of membership set forth in the club charter. A copy of the charter must be on file in the principal's office.

Any organization must be sponsored by a member of the faculty approved by the principal, deposit all monies collected and check out all monies through the school's financial secretary according to school regulations. All club accounts shall be audited, have the approval of the sponsor for the time and place and all activities carried on by the organization, including regular meetings. The sponsor must be present at all meetings and request and receive approval from the school principal for special social events.

School-sponsored clubs may be permitted to use official name of the school, to use building and other facilities, to have publicity in daily bulletins, bulletin boards and school publications, to wear identifying emblem but not special clothing, to sell on school premises tickets or bids to special activities sponsored by the club.

No off-campus or private clubs are permitted to function in the school. They are also restricted from advertising in any form.

The only clubs and organizations which may use school facilities during the school day are those which are school sponsored. The school day includes nonclassroom time.

It is the obligation of the school principal to see to it that the school-sponsored clubs and organizations are not in any way unlawfully selective or discriminatory.

Saddleback Valley Unified School District Administrative Regulation No. 5133.1 provides:

a. *Clubs; School Sponsored* *5133.1*

1. *Responsibilities of the Principal*

(a) Each principal shall be responsible for developing appropriate procedures for forming a school-sponsored club. The steps necessary to form a school-sponsored club are to be in writing, and are to be available in the following locations:

. . . The principal's office

. . . The activities office (if applicable)

. . . The student handbook

. . . The faculty handbook

(b) The principal is responsible for ensuring that each school-sponsored club has an appropriate faculty member as the club sponsor. Voluntary participation by faculty members as sponsors is encouraged. No club may function without a sponsor.

(c) The principal shall review and make the decision to approve or disapprove each club charter, after the Associated Student's governing body has done so. Each charter must contain:

. . . A statement of purpose

. . . A constitution and/or set of bylaws

. . . A method for election of officers

. . . Qualifications and standards for membership

All school-sponsored clubs must have a purpose and conduct activities in compliance with Board Policy 5133.1

(d) The principal shall ascertain that all clubs sponsored by the school are not unlawfully selective nor discriminatory in membership selection nor in the conduct of their activities. Any incidence of unlawful selection or discriminatory conduct is to be dealt with by causing the unlawful practice to cease or by disbanding the club.

(e) The principal shall be responsible for making sure no off-campus, private, or non-sponsored clubs or organizations function on the campus during the school day, including break times, lunch, or other non-classroom time. These clubs or other organizations may apply through the appropriate Use of Facility channels to use school facilities outside of the school day.

2. *Responsibilities of the Sponsor*

(a) Each club sponsor shall be responsible for:

. . . Attending all meetings of the club

. . . Approving all requests for expenditures

. . . Approving all club activities, including location and time

. . . Approving all advertising

(b) The sponsor shall inform the principal or his designee of any significant or potentially significant problems with the club or individual club members.

3. *Freedom of Expression*

Nothing in Board Policy 5133.1 nor Administrative Regulation 5133.1 shall be construed to be in opposition to students' rights of freedom of expression as specified in Education Code Section 48916* or Board Policy 5145.3 and 6144.1.

---

* Former Education Code Section 48916 was repealed in 1983. See, now Section 48907. (Reply App. A at 2-3)